

**“TO THE ADVANTAGE OF ALL CONCERNED”:
PRACTICAL AND PRINCIPLE-BASED ARGUMENTS FOR A
REVISED REMEDY REGIME FOR UNFAIR DISMISSAL IN
AUSTRALIA**

by
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ABSTRACT

Among the extensive literature on the merits of unfair dismissal laws, comparatively little attention has been paid to the key issue of which remedies, and in what form, can best give effect to those laws. In order to address this gap in the literature, this thesis examines remedies for unfair dismissal through an empirical study of all unfair dismissal decisions handed down in Australia during the 2010-2011 financial year by the Australian federal employment tribunal. This thesis also contains a detailed analysis of the theoretical underpinnings of the current remedy regime for unfair dismissal in Australia – which comprises reinstatement and monetary compensation subject to a statutory cap – to assess the merits of those remedies from the perspective of principle.

The results of the analysis reveal some troubling issues of both practice and principle.

First, there is a significant divergence between the law as it appears on the statute books in relation to remedies for unfair dismissal (which emphasises reinstatement and making whole the loss suffered by the unfairly dismissed employee) and the law as it actually operates in practice (in which reinstatement is awarded infrequently and the quantum of compensation ordered in lieu of reinstatement is generally small).

Second, this problem is particularly acute for self-represented applicants. An economic decision-making model is used to show that, in particular, it is likely that this problem causes self-represented applicants to reject settlement offers which they should rationally accept.

Third, neither compensation nor reinstatement is capable of fully realising the purposes that the remedy regime is designed to achieve. In particular, the availability of the remedy of reinstatement against the will of an employer is unsupportable in principle and fails to afford employers a “fair go all round”.

The thesis concludes by proposing that the remedy regime for unfair dismissal in Australia be modified to provide only the remedy of compensation, subject to a significantly larger statutory cap than that which presently applies. It is likely that similar modifications would benefit other jurisdictions around the world, such as Canada and the United Kingdom, which have similar statutory unfair dismissal laws to Australia.

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“TO THE ADVANTAGE OF ALL CONCERNED”: PRACTICAL AND PRINCIPLE-BASED ARGUMENTS FOR A REVISED REMEDY REGIME FOR UNFAIR DISMISSAL IN AUSTRALIA

If the relation of employer and employee is to be of value or profit to either it must be marked by some degree of mutual confidence and satisfaction, and when these are gone and their places usurped by dislike and distrust, it is to the advantage of all concerned that their relation be severed.

- *H W Gossard Co v Crosby*, 132 Iowa 155, 164 (1906)

For my own part, I should be very unwilling to extend decisions the effect of which is to compel persons who are not desirous of maintaining continuous personal relations with one another to continue those personal relations. I have a strong impression and a strong feeling that it is not in the interest of mankind that the rule of specific performance should be extended to such cases.

- Fry LJ in *De Francesco v Barnum* (1890) 45 Ch D 430, 438

Whom to hire is one of the great problems organisation-man faces. If he gets it wrong he may be forced to share a confined space for an indefinite period with someone deficient in wit, aptitude and hygiene, with nothing but a flimsy partition for protection.

- ‘Application’, *The Economist* (London, UK), 14 January 2012, 80

1.0 INTRODUCTION

1.1 Background

In Australia today, employment laws provide employees with significant entitlements and protections beyond those which are contained in their contracts of

employment. Principal among these is the protection provided under the *Fair Work Act 2009* (Cth) in relation to unfair dismissal. Employees who are dismissed in circumstances that are “harsh, unjust or unreasonable” have a statutory entitlement to bring a claim before an employment tribunal and seek reinstatement to their former employment.¹

This statutory right to bring an unfair dismissal claim and seek reinstatement is not unique to Australia. Unfair dismissal laws that include reinstatement as one of the available remedies exist across the common law world, including in Canada, the United Kingdom, and New Zealand.² A further 34 other nations have ratified the United Nations International Labour Organisation’s Convention No C158 on *Termination of Employment*,³ which specifically requires that unfairly dismissed employees have access to appropriate remedies including reinstatement or compensation.

Despite their broad adoption around the world and their existence in Australia since the 1960s,⁴ the merits of unfair dismissal laws remain a source of significant

¹ *Fair Work Act 2009* (Cth) ss 385, 390. The jurisdictional limitations and other nuances of the statutory unfair dismissal protections in Australia are discussed in chapter 2 of this thesis.

² By way of contrast, the United States has entirely eschewed statutory unfair dismissal laws with the notable exception of Montana’s *Montana Wrongful Discharge From Employment Act*, Mont Code Ann 39-2-901 (1987). For a discussion of the history and an analysis of some of the economic effects of Montana’s unfair dismissal laws, see: Steven E Abraham, ‘Can a Wrongful Discharge Statute Really Benefit Employers?’ (1998) 37(4) *Industrial Relations* 499.

³ United Nations International Labour Organisation, *Termination of Employment Convention*, 1982 (C158) <<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C158>>. Hereafter, this will be referred to as the ILO’s Termination of Employment Convention. A list of the nations who have ratified the Convention can be found at <<http://www.ilo.org/ilolex/cgi-lex/ratfice.pl?C158>>.

⁴ For a brief summary of the emergence of unfair dismissal laws in the Australian context, see Gerry Voll, ‘Case Studies in “unfair dismissal” process’ (Paper presented at the 19th Conference of the Association of Industrial Relations Academics of Australia and New

controversy. In academic circles, literally scores of articles have been written debating the fundamental question of whether or not such statutory protections should be provided at all. Scholars in the United States, in particular, have been arguing about the merits of the common law's traditional "at will" approach to employment (which effectively permits unfair dismissals),⁵ as against a possible statutory "just cause" approach to employment (which would prohibit unfair dismissals) for the best part of 50 years, with neither side scoring a decisive victory.

Among this scholarship, economic arguments tend to take centre stage. At essence, these arguments boil down to a debate about whether or not the contractual arrangements that are negotiated between employers and employees absent unfair dismissal laws are "efficient". To economists, a contractual arrangement is considered to be efficient if no alternative contractual arrangement could be made in which one party would be better off without the other party being made worse off.⁶ In simpler terms, a contractual arrangement is regarded as efficient if it maximises the total net benefits that accrue to the parties to the contract.

Zealand, Sydney, 9-11 February 2005) 538
<<http://airaanz.econ.usyd.edu.au/papers/Voll.pdf>>.

⁵ The classic authority for the traditional "at will" approach to employment is *Payne v The Western & Atlantic Railroad Company*, 81 Tenn 507, 519-20, 521 (Ingersoll Sp J) (1884): "All may dismiss their employees at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong... Trade is free; so is employment. The law leaves employer and employee to make their own contracts; and these, when made, it will enforce; beyond this it does not go. Either the employer or employee may terminate the relation at will, and the law will not interfere, except for contract broken."

⁶ Steven Shavell, *Foundations of Economic Analysis of Law* (Harvard University Press, 2004), 293.

Commentators who are opposed to unfair dismissal laws argue that if providing employees with unfair dismissal protections was efficient – that is, if it resulted in the net benefits accruing to parties under the contract being greater than would be the case without the protections – then both employers and employees would have an incentive to negotiate employment contracts that contained such protections.⁷ The fact that employment contracts generally do not contain such protections implies that providing such protections must not be efficient.⁸ It follows,

⁷ This is an example of the application of Coase Theorem, see Ronald H Coase, 'The Problem of Social Cost' (1960) 3 *Journal of Law and Economics* 1.

⁸ The basis for this argument is perhaps easiest to understand by way of an example. Consider an employer who would be willing to offer a wage of \$10 per hour to hire an employee if the employee does not require any protections from unfair dismissal. If this is the contract which is ultimately negotiated, the cost to the employer of the employment is \$10 per hour and the benefit to the employee of accepting the employment is \$10 per hour.

Assume now that the cost to the employer of providing unfair dismissal protections (in the form of increased record-keeping, potential lost productivity from having to retain less productive employees and so on) would work out to be \$2 per hour. As such, the employer would be indifferent between, on the one hand, paying the employee \$10 per hour and providing no protections against unfair dismissal and, on the other hand, paying the employee \$8 per hour and providing the protections. In each case, the total cost incurred by the employer is the same.

Further, assume that the benefit that the employee would derive from the protections (in the form of the value the employee places on the increased job security) would work out to be equivalent to \$4 per hour. As such, the employee would be indifferent between, on the one hand, receiving a wage of \$10 per hour but no protections and, on the other hand, receiving a wage of \$6 per hour alongside the protections. In each case, the total benefit received by the employee is the same.

In this scenario, then, the net benefits from the employer providing the protections is \$4 per hour which exceeds the net costs of providing the protections of \$2 per hour. As such, it would be "efficient" for the contractual arrangements between the parties to provide for protections from unfair dismissal, as the net benefits of doing so would exceed the net costs.

Because of this, *both* the employer and the employee have incentives to agree to a contractual arrangement which includes unfair dismissal protections. For example, the employer would prefer to pay the employee \$7 per hour and provide the employee with unfair dismissal protections at a cost of \$2 per hour rather than pay the employee \$10 per hour and provide no protections. This is because the employer would be better off by \$1 per hour with this arrangement as the total cost to the employer under this arrangement is \$9 as opposed to \$10.

The employee would also prefer this arrangement. This is because the employee would be getting benefits worth \$11 per hour – \$7 in wages and \$4 in the form of the unfair dismissal protections – as opposed to just \$10 in wages if no protections were offered.

then, that governments should not legislate to impose such protections and thus create inefficiencies in the labour market that would not otherwise exist.

On the other hand, commentators in favour of unfair dismissal laws on economic grounds counter that there are various forms of “market failure” which mean that, even though unfair dismissal protections are efficient, parties are not contracting to provide for them. As such, they argue, it is appropriate for the government to step and legislate unfair dismissal protections to correct this market failure. Principally, these commentators refer to an inequality of bargaining power between the parties as the source of market failure, arguing that employees, particularly low-skilled (and thus easily replaceable) employees, are in no position to negotiate unfair dismissal protections into their contracts even if they wanted them.⁹ Alternatively, it is sometimes argued that employees underestimate the value of the benefits that contractual unfair dismissal protections provide (perhaps underestimating the likelihood that their employer will terminate their employment unfairly or the difficulty of getting another job if their employment is so terminated)

Given that it is mutually advantageous for the employer and the employee to agree to unfair dismissal protections in this example, economists predict that if the parties were acting rationally the agreement that they would reach would involve the employer providing protections against unfair dismissal in exchange for the employee accepting a lower wage.

⁹ From an economic theory perspective, this argument only has merit if employers are monopsonists and thus are able to depress wages below the level a competitive market would offer. This is because the mere fact that an inequality of bargaining power exists would not give employers an incentive to refuse unfair dismissal protections if the benefits to employees outweighed the cost to employers. The example in the previous footnote illustrates this point. For a more complete discussion, see Mayer G Freed and Daniel D Polsby, ‘Just Cause for Termination Rules and Economic Efficiency’ (1989) 38 *Emory Law Journal* 1097, 1099-102.

and thus that employees would negotiate unfair dismissal protections if only they properly appreciated the true value of the protections.¹⁰

Empirical evidence in relation to these theoretical economic arguments, both for and against unfair dismissal laws, has been brought to the debate in a variety of ways. Those against unfair dismissal laws have put forward evidence that the presence of such laws drives up total employment costs, resulting in greater unemployment than would exist in the absence of unfair dismissal laws, harming the workforce as a whole.¹¹ Some scholars, using predominantly survey evidence, have suggested that fears of increased unemployment resulting from unfair dismissal laws are overstated and not borne out in practice.¹² Some have suggested that the increased job security that the presence of such laws gives actually benefits employers by encouraging employers and employees alike to invest more into job-specific education and training which provides long-term benefits in terms of employee productivity, the profitability of the business, and thus the economy as a whole.¹³ Others, in response, have argued increased job security results in

¹⁰ See, eg, Paul C Weiler, *Governing the Workplace: The Future of Labor and Employment Law* (Harvard University Press, 1990) 74-5.

¹¹ See, eg, Don Harding, 'The Effect of Unfair Dismissal Laws on Small and Medium Sized Businesses' (Report No 2, Melbourne Institute of Applied Economic and Social Research, 29 October 2002) <<http://melbourneinstitute.com/downloads/reports/ufd.pdf>>; James N Dertouzos and Lynn A Karoly, 'Labor-Market Responses to Employer Liability' (Report No R-3989-ICJ, RAND, 1992) 62-3.

¹² See, eg, Benoit Freyens and Paul Oslington, 'The Likely Employment Impact of Removing Unfair Dismissal Protection' (2005) 55 *Journal of Australian Political Economy* 56; Ashlee Bryson and Dennis Howard, 'The Impact of the WorkChoices Unfair Dismissal Exemption for Small Businesses on Job Creation: A Study in the Richmond-Tweed Region of New South Wales' (2008) 16(2) *International Journal of Employment Studies* 141, 163-6.

¹³ See, eg, Freed and Polsby, above n 9, 1134-37; Cornelius J Peck, 'Unjust Discharges from Employment: A Necessary Change in the Law' (1979) 40(1) *Ohio State Law Journal* 1, 48.

employees having incentives to shirk, damaging the economic output of employers.¹⁴

Putting to one side the economic merits of unfair dismissal laws that have been the focus of the debate, principle-based arguments have also been deployed by both sides. Some scholars have suggested that, regardless of economic efficiency, basic fairness requires that employees be protected from dismissals that are arbitrary or capricious or otherwise unfair.¹⁵ The opposing view is typically framed consistently with the common law's traditional position that notions of mutuality mean that employers should not be limited in their ability to dismiss employees, given that employees cannot be compelled to work.¹⁶

The scores of books, articles and reports published over the last 50 years on the topic certainly indicate that the debate over the merits of unfair dismissal protections is a persistent one. The brief summary of some of the key arguments provided above cannot do justice to the vast literature that has been written on the issue. Indeed, looking at the volumes of articles on this topic with which I currently share my desk, it is difficult to think of what future scholars could usefully add to what has already been written. Yet, the debate does not seem to be any closer to a

¹⁴ See, eg, Stewart J Schwab, 'Life-Cycle Justice: Accommodating Just Cause and Employment At Will' (1993) 92 *Michigan Law Review* 8.

¹⁵ See, eg, Clyde W Summers, 'Individual Protection Against Unjust Dismissal: Time for a Statute' (1976) 62 *Virginia Law Review* 481, 519-20; Jack M Beermann and Joseph W Singer, 'Baseline Questions in Legal Reasoning: The Example of Property in Jobs' (1989) 23 *Georgia Law Review* 911, 974.

¹⁶ See, eg, Lawrence E Blades, 'Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power' (1967) 67 *Columbia Law Review* 1404, 1419-21.

definitive resolution than when it began in earnest over half a century ago. As such, the question remains: where can the debate profitably be taken from here?

1.2 The purpose of this thesis

This thesis is about the operation of unfair dismissal laws in Australia. However, the purpose of this thesis is not to attempt to resolve or even directly add to the seemingly intractable debate about whether or not having unfair dismissal laws is desirable. From the perspective of considering Australia's laws, the academic debate, though interesting, is largely moot. Whatever the economic or other merits of protecting employees from unfair dismissals may or may not be, the situation in Australia is that unfair dismissal laws are a deeply entrenched part of the employment law landscape.

That situation is not likely to change in the foreseeable future. There are two main reasons for this. First, there is the practical impediment that Australia has ratified the ILO's Termination of Employment Convention and thus would need to denounce the Convention before moving to abolish unfair dismissal laws, or else be in breach of its international obligations. Second, and more significantly, to consider abolishing unfair dismissal laws would require a dramatic shift in the domestic political climate that, at the present time, seems inconceivable. While the precise scope of unfair dismissal laws is frequently a flashpoint of political debate between the two major political parties in Australia,¹⁷ the accepted wisdom is that proposing

¹⁷ The application of the laws to small business employers being a particular point of contention, see Mark Skulley, 'Battle for the workplace', *The Australian Financial Review* (Sydney) 19 February 2010, 61.

the complete abolition of unfair dismissal laws would be “political suicide”.¹⁸ Indeed, it is generally thought that it was voters punishing the conservative Liberal Party’s previous attempt to narrow the scope of unfair dismissal through statutory reforms in 2005 (commonly known as the “Work Choices” reforms) that was the principal basis on which the Liberal Party lost the two subsequent general elections.¹⁹ Perhaps in recognition of that fact, senior Liberal Party figures have repeatedly stated that such reforms are “completely dead”²⁰ (or, in one particularly emphatic and colourful turn of phrase, “dead, buried and cremated”)²¹ and will not be resurrected.

In these circumstances, it seems that, in Australia at least, unfair dismissal laws are here to stay. In that context, it seems an appropriate time to shift the focus of the debate away from whether or not unfair dismissal laws should exist at all and, given that they do exist, to focus instead on how unfair dismissal protections can best operate.

One key aspect of the way in which the protections operate in practice relates to the remedies that are available to employees who have been unfairly dismissed. After all, as the equitable maxim *ubi jus ibi remedium* reminds us, there is no real

¹⁸ For a recent statement to this effect, see ABC Radio National, ‘Qantas and the ghost of Workchoices’, *Background Briefing*, 6 November 2011 (Stan Correy) <<http://www.abc.net.au/radionational/programs/backgroundbriefing/qantas-and-the-ghost-of-workchoices/3613246#>>.

¹⁹ See, eg, Editorial, ‘WorkChoices failed once. That was enough’, *The Age* (Melbourne), 17 February 2010, 18.

²⁰ See, eg, ABC News, *House of Reps seals “death” of WorkChoices*, (19 March 2008) ABC <<http://www.abc.net.au/news/2008-03-19/house-of-reps-seals-death-of-workchoices/1077468>> (quoting Senator Guy Barnett).

²¹ Patricia Karvelas, ‘Tony Abbott signs contract on Work Choices but muddles message on workplace laws’, *The Australian* (Melbourne), 19 July 2010 <<http://www.theaustralian.com.au/national-affairs/tony-abbott-signs-contract-on-work-choices-but-muddles-message-on-workplace-laws/story-fn59niix-1225893906267>>.

right without an effective remedy. Yet, despite its centrality to unfair dismissal protections, consideration of the most appropriate remedies has generally been addressed only in a peripheral way in the majority of the scholarship to date.²² In particular, there has been no detailed analysis of the merits of possible remedy regimes in the context of unfair dismissal laws in Australia.

The purpose of this thesis is to address this gap in the literature and answer the fundamental question: what remedies should be available to employees in Australia who have been unfairly dismissed? Ultimately, in answering that question, this thesis will argue that the current remedy regime for unfair dismissal in Australia should be revised to remove the possibility of reinstatement as a remedy and to increase the statutory cap on the amount of compensation that may be awarded to unfairly dismissed employees to the equivalent of three years' remuneration.

1.3 Remedies for unfair dismissal: the scholarship to date

The existing scholarship dealing with remedies for unfair dismissal can be divided into three categories:

- descriptions or comparisons of remedy regimes operating in different jurisdictions;
- empirical studies of attitudes towards, or outcomes of, particular remedy regimes; and

²² This is discussed further in section 1.3 of this thesis below.

- analyses of the merits of possible remedy regimes and recommendations as to which remedy regime should be preferred.

What follows is a summary of the literature in each of these categories and then a brief discussion of how this thesis will contribute to addressing some significant gaps that are apparent within that literature.

(a) *Descriptions / comparisons of remedy regimes operating in different jurisdictions*

Most scholarship that has dealt with remedies for unfair dismissal to date has been descriptive in nature. In particular, a significant number of articles have been written describing or comparing the remedy regimes that operate in different jurisdictions that have unfair dismissal laws.²³ These articles reveal that, in broad terms, legislators are limited to a choice between providing one or both of the following remedies: monetary compensation and reinstatement of the dismissed

²³ See, eg, Herbert L Sherman Jr, 'Reinstatement as a Remedy for Unfair Dismissal in Common Market Countries' (1981) 29(3) *The American Journal of Comparative Law* 467 (describes the law and practice around reinstatement as a remedy for unfair dismissal in nine countries that made up the European Economic Community at the time); Michael Emerson, 'Regulation and Deregulation of the Labour Market – Policy Regimes for the Recruitment and Dismissal of Employees in the Industrialised Countries' (1988) 32 *European Economic Review* 775, 786-9, 808-9 (describes dismissal laws in 16 European countries plus the United States and Japan); Edward P Lazear, 'Job Security Provisions and Employment' (1990) 105(3) *Quarterly Journal of Economics* 699 (reviews the nature and economic effect of job security laws in 22 countries across Europe, North America, Oceania, and Asia); Terry H Wagar, 'Comparative Systems of Wrongful Dismissal: The Canadian Case' (1994) 536 *Annals of the American Academy of Political and Social Science* 56 (describes the operation of unfair dismissal laws across Canada's provincial and federal jurisdictions); Susan Corby, 'Unfair Dismissal Disputes: A Comparative Study of Great Britain and New Zealand' (2000) 10(1) *Human Resource Management Journal* 79 (describes the unfair dismissal regimes that operate in Great Britain and New Zealand); International Labour Standards Department, 'Termination of employment instruments - Background paper for the Tripartite Meeting of Experts to Examine the Termination of Employment Convention, 1982 (No. 158), and the Termination of Employment Recommendation, 1982 (No. 166)' (TMEE/C.158-R.166/2011, International Labour Organisation, 19-21 April 2011) (summarises the unfair dismissal laws of 55 member states of the International Labour Organisation).

employee to their former employment. However, within these two categories of remedies – compensation and reinstatement – commentators describe a wide range of variations on the precise form that these remedies take and the limitations that are imposed upon them across the various jurisdictions considered.

Currently in Australia, reinstatement is the primary remedy and monetary compensation can only be ordered in lieu of reinstatement if the decision-maker considers reinstatement to be inappropriate in all the circumstances.²⁴ Further, if compensation is to be ordered, the amount that can be ordered is subject to a statutory cap.²⁵ Costs are, for all intents and purposes, unrecoverable.²⁶

Yet, obviously, this is only one set of the permutations that a remedy regime for unfair dismissal can take. Scholars have described the law in other jurisdictions, such as Belgium, where different permutations have been adopted. There, for example, only a capped amount of monetary compensation is available as a remedy, and reinstatement cannot be ordered.²⁷ Scholars describing Canada's federal jurisdiction demonstrate another permutation: reinstatement and compensation are both available and the amount of compensation that can be

²⁴ Fair Work Act 2009 (Cth) s 390(3). For a discussion of how this concept has operated in practice (albeit pursuant to the previous, but almost identically worded, *Workplace Relations Act 1996* (Cth)), see Karen Wheelright, 'Remedies for Unfair Dismissal under the *Workplace Relations Act 1996* – A Fair Go All Round?' (2001) 1 *Macquarie Law Journal* 173. For a discussion of what is necessary for an employer to comply with an order for reinstatement in Australia, see Shae McCrystal, 'Unfair Dismissal, Reinstatement and Garden Leave: *Blackadder v Ramsay Butchering Services Pty Ltd*' (2005) 33(3) *Federal Law Review* 555.

²⁵ *Fair Work Act 2009* (Cth) s 390(5).

²⁶ Costs may be ordered only if the employment tribunal considering the case believes that an application or defence was frivolous or vexatious: *ibid* s 611.

²⁷ See Sherman Jr, above n 23, 469. Although Sherman's paper dates from 1981, the position with respect to Belgium remains current, see International Labour Standards Department, above n 23, 54, 110.

ordered is unlimited.²⁸ In the United Kingdom, employers could elect to abide by an order of reinstatement or else pay an increased amount of compensation in exchange for not having to reinstate the employee.²⁹ Grievance arbitrators acting pursuant to collective agreements in Canada are typically empowered to award reinstatement subject to conditions with which the dismissed employee must comply – another remedial possibility.³⁰ In New Zealand, a dismissed employee who is successful in their claim may be awarded costs as part of their remedy.³¹ The list of possible permutations that have been (or could be) adopted in relation to remedies for unfair dismissal that is described in this literature is seemingly endless.

While this category of scholarship on unfair dismissal is helpful, in the sense of alerting readers to the range of remedy regimes that it would be possible for a jurisdiction to adopt, its contribution generally stops short of assisting any assessment or analysis of what is the best remedy regime for a given jurisdiction to adopt.

²⁸ For a discussion of this issue, see Geoffrey England, 'Report to the Task Force on Part 111 of the Canada Labour Code regarding the termination of employment provisions of the Canada Labour Code' (Report, Human Resources and Skill Development Canada, 16 March 2006) 48.

²⁹ Sherman Jr, above n 23, 503-4.

³⁰ For an example, in the context of reinstatement ordered by an arbitrator appointed pursuant to a collective bargaining agreement, see *Canadian Pacific Railway and United Steelworkers of America, Local 1976* (Canadian Railway Office of Arbitration Case No. 3415, Calgary, 10 March 2004) <<http://arbitrations.netfirms.com/croa/35/CR3415.htm>>.

³¹ Corby, above n 23, 82.

(b) *Empirical studies of attitudes towards, or outcomes of, particular remedy regimes*

A number of studies have been undertaken, particularly in the United Kingdom, to attempt to describe how remedy regimes for unfair dismissal are operating in practice. The most frequently cited are those of Dickens et al, Evans et al, and Williams and Lewis, each dating from the 1980s and each analysing, in significant detail, the impact of the remedy regime for unfair dismissal in the United Kingdom.³² The Dickens study is the most comprehensive and provides detailed statistics on every conceivable aspect of the unfair dismissal claim process. This includes statistics on the total number of claims, the number of those resolved prior to hearing, the reasons why parties agreed to settle claims prior to hearing, how parties calculated an acceptable settlement amount, the reasons why those who proceeded to hearing did so, the time taken to get to a hearing, the frequency with which dismissed employees sought reinstatement as a remedy, the relative success of employers and employees at hearing, the remedies awarded at hearing, and the time it took dismissed employees to find new jobs. Ultimately, key findings from the study were that most cases settled prior to hearing for relatively little money³³ and

³² Linda Dickens, Michael Jones, Brian Weekes and Moira Hart, *Dismissed – A Study of Unfair Dismissal and the Industrial Tribunal System* (Basil Blackwell Ltd, 1985); Stephen Evans, John Goodman and Leslie Hargreaves, 'Unfair Dismissal Law and Employment Practice in the 1980s' (Research Paper, Department of Management Sciences University of Manchester, July 1985); Kevin Williams and David Lewis, 'Legislating Job Security: The British Experience of Reinstatement and Reengagement' (1982-1983) 8(3) *Employee Relations Law Journal* 482 (this article reported the results of an earlier survey undertaken by the authors that had been commissioned by the United Kingdom's Department of Employment: Kevin Williams and David Lewis, 'The Aftermath of Tribunal Reinstatement and Re-engagement' (Research Paper No 23, Department of Employment, 1981)).

³³ Dickens et al, above n 32, 142-6, 162-4.

reinstatement was very rarely awarded as a remedy in those cases that did proceed to hearing.³⁴

The Evans study involved case studies of 81 employers of varying sizes. From these case studies statistics were produced on the reported impact of unfair dismissal laws on the employers' operations and, in particular, their hiring and firing policies. The unfair dismissal laws in question provided for the remedies of monetary compensation and reinstatement at the discretion of the decision-maker. The Evans study found that the main effect of the introduction of unfair dismissal laws was to cause employers to adopt formalised procedures for dealing with employee misconduct or unsatisfactory performance to minimise the risk of claims and, hence, the application of the statutory remedies.³⁵

The Williams and Lewis study focused on reporting the effectiveness of reinstatement orders made pursuant to the United Kingdom's unfair dismissal laws between 1972 and 1977. The findings were not overwhelmingly positive about the success of such orders. In about a quarter of cases the employee did not return to work, usually because the employer simply refused to comply with the reinstatement order.³⁶ In those cases where the dismissed employee did return to work, 25 per cent either resigned or had been dismissed again within six months and the

³⁴ Ibid 107-11.

³⁵ Evans, Goodman and Hargreaves, above n 32, 71.

³⁶ Williams and Lewis, 'Legislating Job Security: The British Experience of Reinstatement and Reengagement', above n 32, 485.

average period that the employee remained with the employer was only a little over a year.³⁷

Other empirical studies into the outcomes of various remedy regimes, although generally less comprehensive than the three discussed above, have also been undertaken. The content of these studies and their key findings will be outlined in turn in chronological order.

First, in the 1970s, McDermott and Newhams studied the success of 53 reinstatement orders in the context of orders made pursuant to grievance arbitration under collective agreements in the United States,³⁸ following similar studies undertaken by Ross in 1957³⁹ and Jones in 1961.⁴⁰ The main findings of McDermott and Newhams were that only three of the reinstated employees were subsequently dismissed and that management, particularly of the larger employers involved in the study, generally considered that the reinstated employees to be satisfactory or better

³⁷ Ibid 487-8. The value that can be placed on this last statistic is questionable as the publication date of Williams and Lewis' research paper provided an upper bound to the potential period of employment that could go into calculating the statistic. This issue was briefly noted by the authors themselves (at 487) and was also considered in the subsequent Dickens study: Dickens et al, above n 32, 120-1.

³⁸ Thomas J McDermott and Thomas M Newhams, 'Discharge-Reinstatement: What Happens Thereafter' (1970-1971) 24 *Industrial and Labor Relations Review* 526.

³⁹ Arthur M Ross, 'The Arbitration of Discharge Cases: What Happens After Reinstatement' (Paper presented at the Tenth Annual Meeting of the National Academy of Arbitrators, Washington DC, 1957).

⁴⁰ Dallas L Jones, *Arbitration and Industrial Discipline* (University of Michigan, 1961).

in their post-reinstatement performance.⁴¹ These equated with similar findings in the previous studies undertaken by Ross and Jones.⁴²

Gold et al, also in the 1970s, examined the outcomes of reinstatement orders made by arbitrators in respect of dismissals of 35 public school teachers in New York State.⁴³ Gold's study concluded that the effectiveness of the reinstatement orders was "dismal"⁴⁴ on the basis, principally, that less than one-third of the reinstated teachers went on to be retained permanently by their school districts.⁴⁵

In 1978, Daniel and Stilgoe published the results of surveys they conducted with employers on the impact of the United Kingdom's *Employment Protection Act 1975*, an Act which included, amongst other things, protections against unfair dismissal.⁴⁶ Their survey did not focus on the remedy regime but it is implicit that the changes that employers attributed to their workplace practices as a consequence of unfair dismissal protections were changes brought about to reduce the risk of remedies being awarded. In this regard, Daniel and Stilgoe found that the primary effects of unfair dismissal protections were that employers reported taking more care in making hiring decisions and adopting more rigorous procedures and

⁴¹ McDermott and Newhams, above n 38, 539.

⁴² For a summary of all three studies, see Charlotte Gold, Rodney E Dennis and Joseph Graham III, 'Reinstatement After Termination: Public School Teachers' (1978) 31(3) *Industrial and Labor Relations Review* 310, 315-18.

⁴³ Ibid.

⁴⁴ Ibid 319.

⁴⁵ Ibid 316, 319.

⁴⁶ W W Daniel and Elizabeth Stilgoe, *The Employment Protection Laws* (Policy Studies Institute, 1978).

record keeping in relation to employee misconduct or underperformance that might lead to dismissal.⁴⁷ These findings are consistent with those reported in the Dickens study conducted subsequently, outlined above.

In 1981, the results of an eight year study by Chaney regarding the outcome of 217 reinstatement orders issued by arbitrators in Texas between 1971 and 1972 was published.⁴⁸ Chaney, in drawing conclusions from the study, stated that the effectiveness of reinstatement as a remedy was “highly questionable”.⁴⁹

Approximately 96 per cent of the reinstated employees had left their employment by the conclusion of the study and approximately 65 per cent of those reported that the reason for leaving was because of unfair treatment by their employer after they were reinstated.⁵⁰

A study of reinstatement orders made in three Australian state jurisdictions was conducted by Sherman in the 1980s.⁵¹ Sherman concluded that the likelihood of reinstatement being ordered, and the effectiveness of it when it was ordered, was directly related to whether or not the focus of the jurisdiction was on the maintenance of industrial peace (that is, avoiding strikes and other coercive behaviour by employees and unions) or on providing justice to individuals who have

⁴⁷ Ibid 74-5, 79-81.

⁴⁸ Warren H Chaney, ‘The Reinstatement Remedy Revisited’ (1981) 32(6) *Labor Law Journal* 357.

⁴⁹ Ibid 365.

⁵⁰ Ibid 363-4.

⁵¹ Mark R Sherman, ‘Unfair Dismissal and the Remedy of Reinstatement’ (1989) 31(2) *Journal of Industrial Relations* 212.

been unfairly dismissed.⁵² Where the focus was on the maintenance of industrial peace (and thus, by implication, it was more likely that unions were present in the workplace and would be able to protect reinstated employees from unfair conduct by the employer) outcomes were found to be significantly better.⁵³

Trudeau conducted a similar study into reinstatement orders made in Quebec in 72 cases in the 1980s.⁵⁴ Trudeau found that two-thirds of those who had returned to work prior to the publication of the study reported experiencing unjust treatment by their employer post-reinstatement and that 40 per cent had left their employment.⁵⁵ The conclusion Trudeau reached, based on these findings, was that “reinstatement is not effective as the *basic* remedy against wrongful dismissal of non-union employees” but nonetheless had the potential to be effective in particular cases.⁵⁶

In 1991, a study by Barnacle was published of the outcomes of arbitration decisions made under collective agreements in relation to contested dismissals in Ontario between 1983 and 1986.⁵⁷ This highly detailed study reported statistics about the various grounds on which employees were dismissed, their success at contesting their dismissal, the remedies awarded where dismissed employees were successful at arbitration, and, where employees were reinstated, their post-

⁵² Ibid 225-8.

⁵³ Ibid 222-3.

⁵⁴ Gilles Trudeau, ‘Is Reinstatement a Remedy Suitable to At-Will Employees?’ (1991) 30(2) *Industrial Relations* 302.

⁵⁵ Ibid 310-12.

⁵⁶ Ibid 312 (emphasis in original).

⁵⁷ Peter J Barnacle, *Arbitration of Discharge Grievances in Ontario: Outcomes and Reinstatement Experiences* (Industrial Relations Centre, Queen’s University, 1991).

reinstatement experience. Of particular relevance, Barnacle's study found that where the dismissal was found to be unfair (54 per cent of the 821 cases studied), reinstatement was ordered by arbitrators 100 per cent of the time, sometimes with additional monetary compensation in the form of varying amounts of back pay.⁵⁸ In relation to post-reinstatement experience, Barnacle considered that his findings indicated that the remedy of reinstatement would be successful "more often than not".⁵⁹ This was despite the fact that Barnacle identified that only 210 of the 240 reinstated employees for which he had data actually returned to work,⁶⁰ employers considered that 48 per cent of those had performance levels that were unsatisfactory or only partially satisfactory post-reinstatement,⁶¹ and 45.2 per cent of reinstated employees who returned to work had either been dismissed again or quit by the time the survey was conducted in 1988.⁶²

Turning back to the Australian context, Chelliah and D'Netto, citing a "dearth" of rigorous research on the outcomes of unfair dismissal cases in Australia, published a study in 2006 of 342 unfair dismissal cases determined by the (now replaced) federal Australian Industrial Relations Commission between 1997 and 2000.⁶³ The study focused on determining the frequency with which the two different remedies of compensation and reinstatement were awarded, the factors present in dismissals which made it more or less likely for the dismissal to be viewed

⁵⁸ Ibid 106-8.

⁵⁹ Ibid 302.

⁶⁰ Ibid 197.

⁶¹ Ibid 207-8.

⁶² This represents 95 of 210 employees, see *ibid* 200-6.

⁶³ John Chelliah and Brian D'Netto, 'Unfair Dismissals in Australia: Does Arbitration Help Employees?' (2006) 28(5) *Employee Relations* 483.

as unfair, and the factors which appeared to drive the size of compensation awards where such awards were made. Chelliah and D'Netto found that while about half the claims were upheld as being unfair dismissals, only about 11 per cent of complainants were reinstated⁶⁴ and compensation awards made in lieu of reinstatement were low (an average of approximately 13 weeks' wages relative to a statutory cap of 26 weeks' wages).⁶⁵

Finally, in 2008, Southey published an analysis of unfair dismissal hearings conducted by the Australia Industrial Relations Commission during 2004 and 2005.⁶⁶ The stated purpose of this analysis was "to identify the areas in which business performed well and not so well in defending their dismissal actions".⁶⁷ As such, the focus of the analysis was on the reasons for dismissal and the characteristics of the employer (for example, industry sector and business size). Nonetheless, the analysis reported some basic descriptive statistics on the outcome of the arbitrations and the remedies awarded. These were not dramatically different from those reported in Chelliah and D'Netto's earlier study. Southey found that the dismissed employee was successful in establishing that their dismissal was unfair in 37 per cent of cases, reinstatement was awarded in 17.6 per cent of those cases (which equates to approximately 6.5 per cent applicants being reinstated), and where compensation was awarded in lieu of reinstatement it was generally of a low

⁶⁴ Ibid 489.

⁶⁵ Ibid 492.

⁶⁶ Kim Southey, 'Forward with Unfair Dismissal Claims' (2008) 19 *Labour & Industry* 25.

⁶⁷ Ibid 26.

amount (with most cases being resolved by a compensation order of less than \$10,000).⁶⁸

(c) *Analyses of the merits of possible remedy regimes*

Despite the myriad articles that have been written on unfair dismissal in general and the subsection of that literature, outlined above, which describes various possible remedy regimes and occasionally their outcomes, detailed analysis of the merits of different remedy regimes has been rare. If the merits of a particular remedy are directly considered at all by commentators, and often they are not, the remedy that is proposed is generally treated in a cursory manner, as though its appropriateness is self-evident. Typically, a brief statement is made towards the end of an article that is in favour of unfair dismissal laws to the effect that reinstatement is the only remedy that can make whole the loss of the dismissed employee and therefore that it is the remedy that should be available.⁶⁹

Alternatively, a few authors make similarly brief statements about the difficulties of a dismissed employee reintegrating with a workplace that does not want them and cite this as the reason why compensation may be the only workable remedy.⁷⁰

While these are valid points to raise, they do not appear to represent the entirety of the issues deserving consideration when it comes to assessing the best

⁶⁸ Ibid 36-8.

⁶⁹ See, eg, Summers, above n 15, 531; Charles B Craver, 'Rearranging Deck Chairs on the Titanic: The Inadequacy of Modest Proposals to Reform Labor Law' (1995) 93 *Michigan Law Review* 1616, 1626-7.

⁷⁰ See, eg, Samuel Estreicher, 'Unjust Dismissal Laws: Some Cautionary Notes' (1985) 33 *American Journal of Comparative Law* 310, 322; Mark Thompson, *Rights and Responsibilities in a Changing Workplace: A Review of Employment Standards in British Columbia* (Ministry of Skills, Training and Labour (British Columbia), 1994) 145.

remedy for unfair dismissal. More significantly, briefly made theoretical points divorced from any consideration of how a remedy regime will operate in practice may be of limited usefulness in assessing whether it is appropriate to modify a remedy regime that is currently operating.

A few scholars have bucked this trend and have given more careful consideration to the issue of remedy.⁷¹ Principal among these are Professor Martha West from the University of California and Professor Paul Weiler from Harvard Law School. Their analyses of the issue will be summarised in turn.

West explored the history of individual employment law and the emergence of various remedy regimes for unfair dismissal in her 1988 article, “The Case Against Reinstatement in Wrongful Discharge”.⁷²

As the title of her article indicates, West is not in favour of reinstatement being relied on as the principal remedy in cases of unfair dismissal in the United States. This is particularly so if what is sought by having reinstatement as the remedy is the continued employment of unfairly dismissed employees and the deterrence of unfair dismissals by employers. West cites some of the empirical studies outlined in the preceding subsection of this thesis, along with a number of individual case studies, as evidence of the limited success reinstatement orders

⁷¹ Specifically, G de N Clark, ‘Unfair Dismissal and Reinstatement’ (1969) 32(5) *Modern Law Review* 532; Warren H Chaney, ‘The Reinstatement Remedy Revisited’ (1981) 32(6) *Labour Law Journal* 357; Susan L Catler, ‘The Case Against Proposals to Eliminate the Employment At Will Rule’ (1983) 5(4) *Industrial Relations Journal* 471, 502-7; Martha S West, ‘The Case Against Reinstatement In Wrongful Discharge’ [1988] *University of Illinois Law Review* 1; Weiler, above n 10, 78-104; Trudeau, above n 54.

⁷² West, above n 71.

have had in achieving long term re-employment for those who are reinstated.⁷³

While recognising that reinstatement, even if only for a short term, may have significant benefits for employees who subsequently resign (for example, by removing the “stigma of having been discharged and therefore making finding another job easier”),⁷⁴ West concludes that a statutory monetary award in addition to back pay would be preferable overall.⁷⁵ West argues such that a remedy regime is likely to better achieve the presumed goals of unfair dismissal laws – making whole the loss suffered by a dismissed employee and deterring future unfair dismissals by employers.

West’s analysis, while wide-ranging, is not immune from criticism. West argues, for example, that reinstatement is ineffective in deterring unfair dismissals because it “costs the employer nothing” (beside a possible loss of face) to reinstate the dismissed employee.⁷⁶ In my experience as a lawyer acting for employers facing unfair dismissal claims in Australia, this certainly does not reflect employers’ perceptions of their own costs. Indeed, most employers consider that reinstatement is a remedy to be avoided at all costs. As a consequence, it is not unheard of for employers to agree to settle an unfair dismissal claim for more than the maximum compensation that could be ordered as a remedy at hearing, if only to avoid the possibility of having to reinstate the employee.

⁷³ Ibid 28-40.

⁷⁴ Ibid 40.

⁷⁵ Ibid 56-9.

⁷⁶ Ibid 64.

More significantly for the purposes of this thesis, West's article, unavoidably given its age, does not address the Australian unfair dismissal laws or any empirical data on their functioning. West also does not consider the impact that removing reinstatement as an available remedy may have on the parties' leverage or their incentives in settling unfair dismissal claims – a key consideration in applying her proposed solution to the Australian context.

Turning to Weiler's seminal treatise on labour law, published in 1990 – *Governing the Workplace* – a significant portion of his book is dedicated to an in-depth consideration of protections from unfair dismissal laws and how these can best be implemented.⁷⁷

In relation to remedy, Weiler argues that compensation is simply inadequate as an antidote to the loss of a job for many individuals.⁷⁸ Furthermore, he suggests that a remedy of compensation is impractical on the basis that sizeable compensation awards would need to come from courts (as opposed to administrative tribunals) to be regarded as legitimate, yet ad-hoc juries are ill-equipped to fairly resolve difficult termination decisions and accurately calculate damages in the context of a particular industry, occupation and employer.⁷⁹ Compounding these problems, Weiler suggests that courts are too slow and

⁷⁷ Weiler, above n 10, 49-104.

⁷⁸ Ibid 63-7.

⁷⁹ Ibid 80.

expensive for most individual employees to be inclined to rely upon them to vindicate their rights in this context.⁸⁰

Weiler's preferred solution, albeit one that he admits is theoretical only, would be for unions or employees to agitate unfair dismissal claims before arbitrators in accordance with procedures established under the collective agreement that applies to the dismissed employee's employment.⁸¹ Under these procedures, reinstatement should be the only available remedy.⁸² Weiler cites some of the empirical studies outlined above as indicating that reinstatement in this context – in workplaces with a collective agreement and therefore a union presence – is likely to be relatively successful.⁸³ However, as Weiler is quick to point out, the trouble with this solution is that collective agreements cover "far too small a fraction of the labor force... to make collective bargaining a realistic source of job protection for the vast majority of American workers".⁸⁴

In these circumstances, Weiler's "second-best solution" is to call upon tort, contract and statute-based mechanisms for employees to bring claims alleging unfair dismissal, for which monetary compensation would be the only remedy.⁸⁵ In particular, Weiler proposes the introduction of a statute that would protect those employees:

⁸⁰ Ibid 81-3.

⁸¹ Ibid 87-94.

⁸² Ibid.

⁸³ Ibid 86-7.

⁸⁴ Ibid 94.

⁸⁵ Ibid 99-104

- (a) who could not be reasonably expected to have negotiated their own contractual protections (principally, low-ranking employees); and
- (b) who have been employed for a sufficient length of time to indicate a level of investment in their jobs worthy of compensation.

This protection would take the form of an administrative tribunal which could hear claims from such dismissed employees and order monetary compensation of an amount linked to the number of years of service the dismissed employee had accumulated with the employer.⁸⁶ Despite Weiler's view of the inadequacies of compensation as a remedy, he concludes that "in the absence of worker organization and participation inside the firm, there are inherent limits on the protection that the government can effectively and sensibly provide".⁸⁷

Like West's article, Weiler's book does not (and indeed could not) address the Australian unfair dismissal regime or the effects his analysis of remedy would have in the Australian context. Further, while Weiler gives some consideration to the principle-based arguments for reinstatement as a remedy, his analysis does not address in any detail the potential inequity that forcing employers to retain employees they do not want may entail.

(d) *The contribution of this thesis to the literature*

Considering this literature as a whole, some key points stand out. First, in the scheme of the great quantity of material that has been produced by commentators

⁸⁶ Ibid 102-3.

⁸⁷ Ibid 104.

on unfair dismissal laws, there has been comparatively little empirical research done in relation to remedies. Second, after a relative flurry of studies in the 1970s and early 1980s, the amount of empirical research has fallen off dramatically with only three significant studies published in the last 20 years. Third, only three studies have ever been conducted in relation to Australia, none of which dealt with the current statutory unfair dismissal regime that commenced in Australia in 2009. Fourth, those studies dealing with employees' post-reinstatement experience reveal some mixed results but, overall, present a general view that reinstatement could not be regarded as a successful remedy for a substantial proportion of the employees who participated in the studies. This finding seems particularly strong in relation to those employed in a workplace without a significant union presence. Fifth, the limited detailed consideration that has been given to the merits of particular remedy regimes means that a detailed consideration of the operation of Australian unfair dismissal laws, including an empirical study of the outcome of unfair dismissal claims in Australia, would be a valuable contribution to the existing scholarship.

This thesis is intended to make that contribution. To that end, this thesis contains the result of a detailed empirical analysis of all unfair dismissal cases decided in Australia during the most recent financial year in order to extract data and draw conclusions about how the existing remedy regime operates in practice. As the literature review above demonstrates, such an analysis has not previously been undertaken. While broad statistics about unfair dismissal applications are published

annually by the Australian Government,⁸⁸ these contain insufficient data to permit a proper analysis of how the current remedy regime is working in practice.

The information derived from the empirical analysis of cases contained in this thesis will then be used to provide an important practical perspective to inform the relevant principle-based arguments about what remedies ought to be available to employees who have been unfairly dismissed in Australia.

Furthermore, while careful attention has been paid in the existing scholarship to the potential unfairness of depriving an unfairly dismissed employee of their job (and the consequent financial and psychological effects), little regard has been given to the potential unfairness of forcing an employer to retain an employee in circumstances where the employer no longer wishes to do so and have not undertaken to do so. Addressing these principle-based remedial issues, informed by the empirical analysis of how the current remedy regime is operating in practice, is another key contribution of this thesis to further the existing scholarship.

1.4 Outline of methodology and conclusions of this thesis

This thesis will consider the issue of the most appropriate remedy regime for unfair dismissal through:

- (a) an analysis of the history and current operation of the law relating to unfair dismissal in Australia;

⁸⁸ These are contained in the annual reports of the employment tribunal that deals with unfair dismissal claims and are available online at <http://www.fwa.gov.au/index.cfm?pagename=aboutannual>.

- (b) an empirical analysis of all 512 unfair dismissal cases decided between 1 July 2010 and 30 June 2011 by the Australian employment tribunal, Fair Work Australia; and
- (c) an analysis of the principle-based arguments for and against possible remedy regimes.

Based on this analysis, three main points will be made:

- (a) the potential for reinstatement to be awarded as a remedy for unfair dismissal, coupled with the infrequency with which it is actually awarded in practice, leads many dismissed employees to reject settlement offers that they should rationally accept and to pursue unnecessary and costly litigation as a result;
- (b) the implicit limitation on an employer's freedom to employ (and cease to employ) whomever they see fit that the remedy of reinstatement represents is unfair and unsupportable in principle in the context of the regulation of employment in Australia as a whole; and
- (c) the most appropriate remedy regime for unfair dismissal in Australia involves the abolition of the remedy of reinstatement, coupled with a significant increase to the amount of monetary compensation that may be awarded to employees who have been unfairly dismissed. Such a proposal accords with Australia's international obligations under the ILO's Termination of Employment Convention, is likely to reduce the

amount of unnecessary unfair dismissal litigation, and provides the best achievable balance between the interests of employers and those of unfairly dismissed employees.

1.5 Scope of this thesis

Chapter 2 of this thesis will provide a detailed description of the way in which the unfair dismissal laws in Australia currently operate. However, it is important at the outset to identify the limits of this thesis and to clarify the other types of claims that dismissed employees may make that this thesis does not purport to address.

In Australia, four distinct situations may arise in relation to dismissal that could give rise to a legal claim. First, a dismissal may be unfair, in the sense of being “harsh, unjust or unreasonable” and thus give rise to an unfair dismissal claim under the relevant legislation.

Second, a dismissal may be in breach of the employee’s contract of employment. For example, a contract of employment might provide that the employer can terminate the contract for any reason on four weeks’ notice. If the employer terminates the contract on three weeks’ notice, the employee will have been dismissed in breach of contract and the employee can seek a contractual remedy in the relevant state or territory Supreme Court. It is important to note that all employees in Australia have an individual contract of employment, regardless of whether, in addition, supplementary terms and conditions of their employment are set out in a collective agreement. It is also important to note that it does not follow from the fact that an employee is dismissed in accordance with the terms of their

contract of employment that their dismissal will automatically be regarded as “fair”. For example, an employee may have as a term of his or her employment contract that either party to the contract can terminate on four weeks’ notice. However, even if the employer complied with this notice period, the dismissal may still be regarded as unfair. This may be the case if, for example, the reason the employer terminated the contract was because they suspected the employee had engaged in misconduct which they had not in fact engaged in. In these circumstances, the dismissal would almost certainly be considered to be “harsh, unjust or unreasonable” and thus give rise to a valid unfair dismissal claim, despite the employer’s strict compliance with the terms of the employment contract.

Third, a dismissal may be unlawful in the sense of contravening anti-discrimination legislation. For example, if an employee is dismissed because of their sex or because they are a member of a union, this would be an unlawful dismissal.⁸⁹ To pursue an unlawful dismissal case, the dismissed employee is required to seek a remedy, ultimately, from the Federal Court of Australia rather than from the employment tribunal that deals with unfair dismissal claims. However, a dismissal that is unlawful in this sense would again almost certainly also be regarded as “harsh, unjust or unreasonable”. As such, an employee could choose to bring an unfair dismissal claim instead of an unlawful dismissal claim if they so desired. In practice, this would rarely occur because of the wider range of remedies that are available for an unlawful dismissal claim.

⁸⁹ *Fair Work Act 2009* (Cth) ss 351(1), 346. Describing this as an unlawful termination is a slight simplification. In fact, it would constitute a breach of one of the general protections provisions of the Act for which the employer can be prosecuted and ordered to pay a pecuniary penalty by a court.

Fourth, a dismissal may breach of a term of a collective agreement.⁹⁰ For example, a collective agreement might provide that an employee cannot be dismissed on the basis of redundancy unless the employer has provided the employee with a six month retention period, during which time the employer is required to attempt to find redeployment opportunities for the employee. If the employee is dismissed on the basis of redundancy without having been provided with this retention period, the employee can bring a claim for breach of the collective agreement. In Australia, collective agreements are statutory instruments distinct from ordinary contracts. As such, it is not possible to bring a breach of contract claim in relation to an alleged breach of a collective agreement. Instead, the employee must bring a claim under the *Fair Work Act 2009* (Cth) (**Fair Work Act**) in the Federal Court of Australia specifically for breach of a term of a collective agreement. Again, it is quite possible that a dismissal in breach of the terms of a collective agreement would be regarded as unfair. As such, it is possible that an employee could choose to bring an unfair dismissal claim instead of a claim for breach of a term of a collective agreement in the Federal Court.

This thesis will be limited to considering the first scenario, unfair dismissal, and does not consider in any detail the remedies that are or should be available in relation to any of the other three scenarios. Despite this, the scope of this thesis remains a significant one. The incidence of unfair dismissal claims is substantial with thousands of employers, employees and their families being directly affected by

⁹⁰ In Australia, these are referred to as “enterprise agreements” under the current legislation. In other jurisdictions the same types of agreements are called “collective bargaining agreements” (sometimes shortened to “CBAs”) or similar terms. In this thesis, the term “collective agreements” will be used to describe the concept.

unfair dismissal claims each year.⁹¹ Furthermore, unfair dismissal claims are by far the most prevalent type of claim that is brought in relation to termination of employment each year.⁹² As such, unfair dismissal laws are arguably the most significant part of the regulation of termination of employment in Australia and certainly a subject worthy of consideration on their own.

1.6 Structure of this thesis

Without a clear understanding of the nature and scope of the protections currently afforded to employees in respect of unfair dismissal, it is impossible to determine the form an appropriate remedy regime should take. Consequently, chapter 2 of this thesis contains an overview of the unfair dismissal laws that currently apply in Australia and a brief history of how they came to be that way.

Chapter 3 represents the beginning of the substantive analysis, detailing the methodology and results of the study of all 512 unfair dismissal decisions handed down in Australia between 1 July 2010 and 30 June 2011. The principal findings of the study as they relate to self-represented applicants are developed in chapter 4, with the key conclusions being that:

⁹¹ During the period 1 July 2010 to 30 June 2011, there were 12,840 unfair dismissal claims lodged with the national employment tribunal: Commonwealth of Australia, *Annual Report of Fair Work Australia – 1 July 2010 to 30 June 2011* (Camten Graphics, 2011), 81.

⁹² By way of illustration, during the period 1 July 2010 to 30 June 2011, while there were 12,840 unfair dismissal claims lodged with the national employment tribunal, the combined total of all claims lodged for dismissals that were alleged to be unlawful in one respect or another was only 2,045: *ibid* 80-2.

- (a) the potential availability of the remedy of reinstatement appears to cause many self-represented applicants to reject settlement offers that it would be in their own self-interest to accept; and
- (b) it is likely that this arises from a misperception by claimants of the likelihood that reinstatement will be ordered as a remedy if they are successful at hearing.

Chapter 5 discusses the principle-based arguments for and against the various possible remedy regimes that could be adopted. The chapter concludes that, for reasons of fairness, equality and individual freedom, a remedy regime that compels employers to retain employees who they do not want is not practically desirable, nor supportable in principle.

Chapter 6 draws together the analyses contained in chapters 3, 4 and 5, and presents the case for modifying the current remedy regime for unfair dismissal in Australia. In particular, it is argued in chapter 6 that a remedy regime in which reinstatement is not available but compensation can be awarded, subject to a significantly increased statutory cap, represents the best possible compromise between the interests of employees, employers and taxpayers.

Chapter 7 concludes the thesis, providing a summary of the key findings, a proposal for legislative amendment in Australia, and identifying areas where further research on the topic of unfair dismissal would be worthwhile, based on the conclusions reached in the preceding chapters.

1.7 A counter-intuitive proposal

Before commencing chapter 2 of this thesis, it is appropriate to recognise and address the fact that the argument that this thesis will make – that the remedy regime for unfair dismissal in Australia should be revised to remove the possibility of reinstatement and to raise the cap on the amount of compensation that can be ordered – may strike the reader as misconceived. Specifically, in these trying economic times, with high rates of unemployment and significant income inequality being at the forefront of people’s minds, arguing for an apparent diminution in employees’ rights which may make it harder for employees to hold on to their jobs, might seem exactly the opposite of what is needed. After all, ongoing employment not only provides people with a means of supporting themselves financially, it often provides a range of intangible benefits and is generally regarded as being a key element of many people’s emotional well-being and sense of worth. On this point, Chief Justice Dickson of the Supreme Court of Canada in the 1987 case of *Reference Re Public Service Employee Relations Act (Alta.)*, concisely articulated what most people know instinctively:

Work is one of the most fundamental aspects in a person’s life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person’s employment is an essential component of his or her sense of identity, self-worth and emotional well-being.⁹³

⁹³ [1987] 1 SCR 313, [91] (Dickson CJ). Although Dickson CJ was in dissent in that case, his comments were subsequently quoted with approval by superior courts in Canada including as recently as 2011 by the Supreme Court of British Columbia in the case of *British Columbia Teachers’ Federation v British Columbia* [2011] BCSC 469, [379].

Twenty years earlier, the report of a Royal Commission into trade unions and employers' associations in the United Kingdom commented along similar lines:

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 community and the uprooting of homes and families. Others, and particularly older workers, may be faced with the greatest difficulty in getting work at all...⁹⁴

It seems unlikely that many people would disagree with these statements about the impact that employment (and the loss of it) may have on a person.⁹⁵ In these circumstances, denying unfairly dismissed employees the possibility of regaining their former employment, as this thesis proposes, may seem to strike a blow against employees' personal dignity and well-being.

In addition, there is undoubtedly a natural logic to having the remedy of reinstatement be available in cases of unfair dismissal. That is, if the wrong that is to be addressed is the unfair termination of an employment relationship, then surely the most effective way to remedy the wrong is to restore that employment relationship until such time as it is terminated fairly. Providing an alternative remedy in lieu of reinstatement, such as compensation as this thesis proposes, will rarely compensate unfairly dismissed employees fully for the loss which they have suffered.

⁹⁴ United Kingdom, Royal Commission on Trade Unions and Employers' Associations 1965-1968, *Report* (1968) 142-3.

⁹⁵ For a detailed discussion on the psychological effects of termination of employment and subsequent unemployment summarises a wide body of medical literature, see William Darity Jr and Arthur H Goldsmith, 'Social Psychology, Unemployment and Macroeconomics' (1996) 10(1) *Journal of Economic Perspectives* 121, 122-130.

Each of these points must be acknowledged and accepted. Without a doubt, the availability of reinstatement as a remedy may be valuable to some unfairly dismissed employees, particularly in uncertain economic times when alternative employment may be difficult to obtain. The intangible benefits associated with maintaining an ongoing job to many people's emotional well-being and the fact that monetary compensation will typically fail to entirely make whole the loss an employee suffers from unfair dismissal will not be disputed in this thesis. As such, it must be conceded at the outset that abolishing reinstatement as a remedy for unfair dismissal in Australia is a counter-intuitive proposal.

However, this thesis will seek to demonstrate that there are some particular facts about the way the unfair dismissal regime operates in Australia in practice that mean, counter-intuitive though it may be, abolishing reinstatement as a remedy for unfair dismissal is desirable. In particular, this thesis will attempt to show that abolishing reinstatement will:

- directly affect very few because of the rarity with which it is actually awarded in practice;
- provide a fairer and more consistent system of law for employers and employees alike;
- lessen the burden on taxpayers by reducing the amount of unfair dismissal litigation; and

- most significantly and surprisingly, be of benefit to a sizeable class of dismissed employees themselves by circumventing a problem of information asymmetry that currently exists and appears to cause self-represented applicants to act counter to their own interests in the conduct of unfair dismissal litigation.

While the revised remedy regime for unfair dismissal cases that is proposed by this thesis may not be a “perfect world” solution, it represents the best balance between the interests of employees, employers and the public at large to deal with the practical problems encountered in the real world and would be a significant improvement on the current system.

2.0 HISTORY OF UNFAIR DISMISSAL LAWS IN AUSTRALIA

2.1 Introduction

The purpose of this thesis is to determine the most appropriate remedy regime to support the unfair dismissal protections that are provided under Australian law. In order to do so, it is essential to understand both:

- the way in which the unfair dismissal laws in Australia currently operate; and
- how the unfair dismissal laws in Australia came to be that way.

The goal of this chapter is to provide that understanding. Section 2.2 details the federal statutory regime that addresses unfair dismissal as it exists today. Section 2.3 traces the development of federal regulation of unfair dismissal laws to describe how it came to take its present form.

2.2 The current situation

(a) *The Constitutional backdrop to unfair dismissal laws in Australia*

Australia has a federal system of government, with the federal Parliament having the power to legislate with respect to certain matters under the *Australian Constitution* and the individual states having the power to legislate with respect to other matters.⁹⁶ Historically, employment and industrial relations law were regarded

⁹⁶ There are also some matters about which both the federal Parliament and the state Parliaments can legislate. To the extent of any inconsistency, section 109 of the *Australian Constitution* provides that federal legislation will prevail.

as being largely outside the ambit of federal legislation except in respect of public servants employed by the federal government. Over time, following various decisions of the High Court of Australia regarding the extent of federal Parliament's powers under the *Constitution*, this attitude changed.⁹⁷ The result was that federal Parliament, using a variety of heads of legislative power under the *Constitution* (including the power to legislate in respect of corporations (to cover employees of corporations) and in respect of external affairs (to implement treaty obligations under various ILO treaties including the Termination of Employment Convention)), was considered to have the power to legislate in respect of the employment of almost all employees in Australia.⁹⁸ Employees who remained outside the purview of federal legislation included employees of state governments and employees of unincorporated businesses.

Out of a desire to have a single system of employment and industrial relations laws cover all Australian employees, the federal government attempted to negotiate with each of the states a referral of the relevant legislative powers to enable federal law to deal with the few remaining classes of employees that would otherwise remain outside its reach. This process was largely successful, with Western Australia being the only state that has, as yet, declined to refer its powers. As a consequence, at most only 450,000 Australian employees now remain outside

⁹⁷ For a useful discussion of the key cases, see Darrell Barnett, 'The Corporations Power and Federalism: Key Aspects of the Constitutional Validity of the WorkChoices Act' (2006) 29(1) *University of New South Wales Law Journal* 91, 97-107.

⁹⁸ This position was ultimately confirmed in the landmark case of *New South Wales v Commonwealth* (2006) 229 CLR 1.

the operation of federal employment and industrial relations legislation.⁹⁹ Although Western Australia has its own statutory unfair dismissal regime, given its relative insignificance, this thesis will confine its analysis to the federal unfair dismissal laws.

(b) *The federal unfair dismissal laws*

The federal laws regulating unfair dismissal are contained within the Fair Work Act. In broad terms, a person is “protected from unfair dismissal” under the Fair Work Act, and thus entitled to bring an application for an unfair dismissal remedy, if the following two requirements are met:¹⁰⁰

- (a) The person has completed a defined minimum period of employment (other than as a casual employee) with their employer. The period is 12 months in the case of employees who work for a small business and 6 months otherwise.¹⁰¹
- (b) The person either:
 - (i) is covered by an award¹⁰² or collective agreement; or
 - (ii) earns less than a high income threshold (currently \$118,100; the figure is indexed annually).

⁹⁹ Steven Amendola, *Review of Western Australian Industrial Relations System: Final Report* (Western Australia Department of Commerce, 2009) 67 <<http://www.commerce.wa.gov.au/labourrelations/PDF/Misc/AmendolaReviewofWAIndustrialRelationsSystem.pdf>>.

¹⁰⁰ *Fair Work Act 2009* (Cth) s 382.

¹⁰¹ *Ibid* s 383.

¹⁰² An award is a statutory instrument which sets out terms and conditions of employment for employees who work in a particular job or industry. A full list of the latest iteration of these statutory instruments, called “modern awards”, can be found at Fair Work Australia’s website: <<http://www.fwa.gov.au/index.cfm?pagename=awardsfind#modernawards>>.

As a general proposition, a person who earns in excess of the high income threshold is not likely to be covered by an award or collective agreement as these are instruments that tend to regulate the terms and conditions of lower level employees rather than senior managers.

If a dismissed employee meets the eligibility requirements outlined above, they are entitled to make an application for an unfair dismissal remedy to “Fair Work Australia”, an administrative tribunal created by the Fair Work Act that is empowered to deal with such applications.¹⁰³

Subject to two exceptions, a dismissal will be regarded as unfair for the purposes of the Fair Work Act if it was “harsh, unjust or unreasonable”.¹⁰⁴ The exceptions relate to dismissals by small business employers (if these complied with a “Small Business Fair Dismissal Code” they will be deemed to be fair)¹⁰⁵ and dismissals by any employer if they met the statutory requirements for a “genuine redundancy”.¹⁰⁶

In considering whether or not a dismissal was “harsh, unjust or unreasonable”, Fair Work Australia is required to take into account certain specified factors.¹⁰⁷ While these are described as being seven separate factors (plus a catch-

¹⁰³ *Fair Work Act 2009* (Cth) ss 575, 576(1)(i).

¹⁰⁴ *Ibid* ss 385, 387.

¹⁰⁵ *Ibid* ss 385, 388.

¹⁰⁶ *Ibid* ss 385, 389. A “genuine redundancy” under the Fair Work Act is equivalent to the North American concept of an economic lay off, where the termination of employment is brought about by the fact the employer no longer requires a person to do the job that the dismissed employee was performing.

¹⁰⁷ *Ibid* s 387.

all factor of “any other matter that [Fair Work Australia] considers relevant”), they relate to two essential concepts: (1) whether or not there was a valid reason for the dismissal related to the dismissed person’s capacity or conduct; and (2) whether or not the dismissal was procedurally fair.

If Fair Work Australia concludes that a dismissal was unfair, it has the power to order a remedy.¹⁰⁸ If Fair Work Australia chooses to exercise its discretion to order a remedy, it *must* order reinstatement of the person unless it is satisfied that reinstatement is not appropriate.¹⁰⁹ Only if Fair Work Australia first considers reinstatement as a remedy and concludes that it is not appropriate in the particular circumstances, is Fair Work Australia then empowered to consider whether ordering compensation in lieu of reinstatement is appropriate.¹¹⁰ As such, at least as a matter of statutory interpretation, reinstatement is the primary remedy available to an unfairly dismissed employee.¹¹¹ The emphasis that is placed on reinstatement as a remedy is also stressed in the provision of the Fair Work Act that addresses the objects of the unfair dismissal protections:

¹⁰⁸ Ibid s 390.

¹⁰⁹ Ibid s 390(3)(a).

¹¹⁰ Ibid s 390(3).

¹¹¹ See, eg, *Diane Hammond v Australian Red Cross Blood Service – Sydney* [2011] FWA 1346, [87] (Sams DP) (“Section 381(c) of the Act makes plain, where an applicant demonstrates that he/she was unfairly dismissed, that reinstatement is the primary remedy...”). In practice, reinstatement is ordered rarely. For example, during the period 1 July 2009 to 30 June 2010 (which represents a financial year in Australia) reinstatement was awarded 22 times out of 492 cases that were decided. That equates to reinstatement being ordered in just under 4.5% of cases that proceeded to hearing. See Commonwealth of Australia, *Annual Report of Fair Work Australia – 1 July 2009 to 30 June 2010* (Big Print, 2010) 14.

Section 381 Object of this Part

(1) The object of this Part is:...

(c) to provide remedies if a dismissal is found to be unfair, *with an emphasis on reinstatement*.¹¹²

Reinstatement may be ordered with or without back pay at the discretion of Fair Work Australia.¹¹³ If compensation is ordered in lieu of reinstatement, the amount of compensation is capped at the amount of remuneration that the person received in the last six months of employment or the half of the high income threshold (referred to above), whichever is lower.¹¹⁴ Further, if Fair Work Australia is satisfied that misconduct by the person contributed to the employer's decision to dismiss, the amount of compensation that is ordered must be reduced "by an appropriate amount on account of the misconduct".¹¹⁵ While compensation is generally required to be paid as a lump sum, Fair Work Australia retains a discretion to order that the payment be made in instalments in appropriate circumstances.¹¹⁶

Costs are not generally available to a successful party in an unfair dismissal claim.¹¹⁷ Fair Work Australia is only empowered to order one party to pay another party's costs if:

¹¹² *Fair Work Act 2009* (Cth) s 381 (emphasis added).

¹¹³ *Ibid* s 391(3), (4).

¹¹⁴ *Ibid* s 392(5), (6).

¹¹⁵ *Ibid* s 392(3).

¹¹⁶ *Ibid* s 393.

¹¹⁷ *Ibid* s 611(1).

- (a) the first party made or responded to an application “vexatiously or without reasonable cause”; and
- (b) it should have been reasonably apparent to the first party that the application or response “had no reasonable prospects of success”.¹¹⁸

2.3 The development of federal regulation of unfair dismissal

The story of the development of statutory unfair dismissal protections in the Australian federal jurisdiction is more a story of opposing political views as to who the protections should cover than a story of dramatic swings in the nature of the protections themselves. As will be seen, the basic regime of protection and the remedies available under that regime have not altered significantly since unfair dismissal claims were first recognised in the federal jurisdiction as a statutory cause of action in the early 1990s.

(a) *First steps: The Industrial Relations Reform Act 1993 (Cth)*

The Commonwealth Government first legislated unfair dismissal protections in the *Industrial Relations Reform Act 1993* (Cth) with the relevant provisions commencing operation in February 1994.¹¹⁹ This amending Act modified the prevailing *Industrial Relations Act 1988* (Cth) with the object, relevantly, of giving effect to the ILO’s Termination of Employment Convention and the associated

¹¹⁸ Ibid s 611(2).

¹¹⁹ For a discussion of the political background to this Act, as well as some criticisms of its drafting, see Andrew Stewart, ‘And (Industrial) Justice for All? Protecting Workers Against Unfair Dismissal’ (1995) 1 *Flinders Journal of Law Reform* 85, 96-106.

Termination of Employment Recommendation.¹²⁰ Australia had ratified the Convention in February 1993¹²¹ and thus had 12 months from that date within which to modify its laws to conform with the Convention.¹²²

The provisions of the Convention set out in some degree of detail how the protections against unfair dismissal are required to operate in practice. The parameters established by the Convention have been closely followed in federal legislation dealing with unfair dismissal ever since. The key relevant provisions in the Convention are as follows:

- | | |
|------------|---|
| Article 4 | The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service. |
| Article 8 | (1) A worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator... |
| Article 10 | If the bodies referred to in Article 8 of this Convention find that termination is unjustified and if they are not empowered or do not find it practicable, in accordance with national law and practice, to declare the termination invalid and/or order or propose reinstatement of the worker, they shall be |

¹²⁰ United Nations International Labour Organisation, *Termination of Employment Convention, 1982 (C158)* <<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C158>>; United Nations International Labour Organisation, *Termination of Employment Recommendation, 1982 (R166)* <<http://www.ilo.org/ilolex/cgi-lex/convde.pl?R166>>.

¹²¹ For a list of all countries who have ratified the Convention, and the date on which they did so, see the ILO's website <<http://www.ilo.org/ilolex/cgi-lex/ratifice.pl?C158>>.

¹²² United Nations International Labour Organisation, *Termination of Employment Recommendation, 1982 (R166)*, art 16(2) <<http://www.ilo.org/ilolex/cgi-lex/convde.pl?R166>>.

empowered to order payment of adequate compensation or such other relief as may be deemed appropriate.¹²³

As can be seen, the Convention permits dismissals relating to the capacity or conduct of an employee as well as economic dismissals so long as, in each case, the reason for the dismissal is “valid”. To give effect to this protection, the Convention requires that an employee who considers that their dismissal was not for a valid reason must be able to appeal to an impartial body to review the dismissal decision. Finally, the Convention requires compensation (or such other relief as may be deemed appropriate) to be available as a remedy where the body reviewing a decision finds that there was no valid reason for the dismissal. Whether or not reinstatement is available as a remedy, on the other hand, is a matter for national law and practice to determine. That is, it is not required to be available for a contracting state to comply with its treaty obligations.

In Australia, the *Industrial Relations Act 1988* (Cth) was modified to closely reflect the terms of the Convention. Specifically, section 170DE was inserted and provided as follows:

- (1) An employer must not terminate an employee’s employment unless there is a valid reason, or valid reasons, connected with the employee’s capacity or conduct or based on the operational requirements of the undertaking, establishment or service.

¹²³

United Nations International Labour Organisation, *Termination of Employment Convention, 1982* (C158), arts 4, 8, 10 < <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C158>>.

- (2) A reason is not valid if, having regard to the employee's capacity and conduct and those operational requirements, the termination is harsh, unjust or unreasonable. This subsection does not limit the cases where a reason may be taken not to be valid.¹²⁴

Under the Act, a dismissed employee, or a union representing a dismissed employee, was entitled to seek review of the dismissal before the Industrial Relations Court. In relation to remedy, section 170EE was inserted into the *Industrial Relations Act 1988* (Cth) and provided:

- (1) After considering the merits of an application...the Court... unless satisfied that the termination of the employee's employment contravened no provision of this Division... may make such orders as it thinks appropriate in order to put the employee in the same position (as nearly as can be done) as if the employment had not been terminated.
- (2) The orders the Court may make include, for example:
- (a) an order declaring the termination to have contravened this Division;
 - (b) an order requiring the employer to reinstate the employee;
 - (c) an order that the employer pay compensation to the employee...¹²⁵

Accordingly, it was open to the Industrial Relations Court to reinstate the employee or order that the employee be paid compensation (or both) as the Court thought appropriate in a given case.

¹²⁴ See *Industrial Relations Reform Act 1993* (Cth) s 21.

¹²⁵ See *ibid.*

The scope of unfair dismissal protections did not extend to all employees. Under the Act and associated regulations,¹²⁶ various categories of employees were specifically excluded from the protections. In particular, employees who had yet to complete an agreed probation period with their employer, employees on fixed term contracts of employment, and casual employees each were denied the ability to bring an unfair dismissal claim.¹²⁷ These exclusions were subsequently revised later in 1994 to remove the exclusion of fixed term employees from the protections unless the fixed term of employment was for less than six months.¹²⁸ The following year, additional exclusions were inserted into the regulations (in respect of trainees and members of the Australian Federal Police)¹²⁹ and into the Act (in respect of employees whose employment was not covered by an award and whose wages were in excess of \$60,000 in the preceding 12 months, indexed annually).¹³⁰

One further change brought about by the 1994 amendments was the introduction of a statutory cap on the amount of compensation that could be awarded to an unfairly dismissed employee. The cap was set at an amount equal to the remuneration the employee would have received in the six months immediately following the dismissal, had the dismissal not taken place.¹³¹

¹²⁶ *Industrial Relations Regulations* (Cth).

¹²⁷ Ibid r 30B (as at 30 April 1994) <<http://www.comlaw.gov.au/Details/C2004H01967>>.

¹²⁸ Ibid r 30B (as at 29 November 1994) <<http://www.comlaw.gov.au/Details/C2004H01971>>.

¹²⁹ Ibid rr 30BA, 30BB (as at 21 December 1995) <<http://www.comlaw.gov.au/Details/C2004H01972>>.

¹³⁰ *Industrial Relations Amendment Act (No 2) 1994* (Cth) s 6.

¹³¹ Ibid s 8.

In relation to costs, the *Industrial Relations Act 1988* (Cth) had always provided that costs could only be awarded only in very limited circumstances:

A party to a proceeding (including an appeal) in a matter arising under this Act shall not be ordered to pay costs incurred by any other party to the proceeding unless the first-mentioned party instituted the proceeding vexatiously or without reasonable cause.¹³²

Following the introduction of unfair dismissal protections into the Act, this limited access to costs extended to unfair dismissal claims and has been retained to the present day under the Fair Work Act.¹³³

(b) *Reinstatement becomes the primary remedy: The Workplace Relations Act 1996 (Cth)*

All of the legislation and amendments described in the preceding subsection of this thesis with respect to unfair dismissal were enacted when the Australian Labor Party was in Government. In 1996 a general election was held, the Australian Labor Party was removed from power, and a coalition of the conservative Liberal Party and National Party came into power. One of the first steps taken by the new Government was to rename and substantially revise the *Industrial Relations Act 1988* (Cth) such that it became the *Workplace Relations Act 1996* (Cth).¹³⁴

In relation to unfair dismissal, there were a number of significant changes brought about by the creation of the *Workplace Relations Act 1996* (Cth). First,

¹³² *Industrial Relations Act 1988* (Cth) s 347(1).

¹³³ See the discussion at section 2.2(b) of this thesis.

¹³⁴ See *Workplace Relations and Other Legislation Amendment Act 1996* (Cth).

responsibility for dealing with unfair dismissal claims shifted from the Industrial Relations Court to an administrative tribunal – the Australian Industrial Relations Commission.¹³⁵ Second, the factors that the Commission had to have regard to in determining whether a dismissal was unfair were modified.¹³⁶ Third, and most significantly for the purposes of this thesis, the remedy regime was modified such that for the first time reinstatement became the presumptive remedy. This was achieved by the insertion of a new subsection into the Act in the following terms:

If the Commission thinks that the reinstatement of the employee is inappropriate, the Commission may, if the Commission considers it appropriate in all the circumstances of the case, make an order requiring the employer to pay the employee an amount ordered by the Commission in lieu of reinstatement.¹³⁷

Fourth, the cap on the amount of compensation that could be ordered was slightly modified. Instead of the cap being set at an amount equivalent to the remuneration the employee would have received in the six months *following the dismissal* had the dismissal not occurred, it was set at an amount equal to the amount of remuneration the employee was entitled to receive in the six months *immediately prior to the dismissal*.¹³⁸ The cap in this form has remained in place unaltered ever since.

Fifth, some amendments were made to the categories of employees excluded from the unfair dismissal protections. In particular, under the *Workplace*

¹³⁵ Ibid sch 6 (in relation to s 170CE(1)).

¹³⁶ See *ibid* (in relation to s 170CG(3)).

¹³⁷ *Ibid* (in relation to s 170CH(6)).

¹³⁸ *Ibid* (in relation to s 170CH(8)).

Relations Act 1996 (Cth) casual employees who had been employed for more than 12 months could now bring an unfair dismissal claim. In addition, the maximum wages an employee who was not covered by an award could earn in a year and still bring an unfair dismissal claim was increased to \$64,000 (again, this figure was subject to indexation).¹³⁹

Unfair dismissal laws in Australia then remained essentially static until some major changes in the coverage of the provisions occurred in 2005.

(c) *A dramatic shift in coverage: "Work Choices" 2005*

In 2005, the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) was enacted by the Federal Government. This legislation, popularly known as Work Choices, amended the *Workplace Relations Act 1996* in various significant respects. However, some of the most fundamental changes related to unfair dismissal. In particular, the amendments resulted the complete exclusion of employees who were employed by businesses with 100 or fewer employees from the unfair dismissal protections.¹⁴⁰ The effect of this amendment was to remove unfair dismissal protections from an estimated 4.2 million employees.¹⁴¹

The stated purpose of these exclusions was to give small businesses immunity from unfair dismissal claims to promote increased hiring and lower

¹³⁹ *Workplace Relations Regulations* r 30BB (as at 11 September 1997) <<http://www.comlaw.gov.au/Details/C2004H01975/>>.

¹⁴⁰ *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) sch 1, item 118.

¹⁴¹ Department of Parliamentary Services (Cth), *Bills Digest*, No 66 of 2005-2006, 2 December 2005, 61.

unemployment.¹⁴² This was based on the economic argument, outlined in section 1.1 of this thesis, that small business employers would be more inclined to hire new employees if they could later dismiss them without risk or cost if circumstances changed in the future.

In addition to this change, other changes included excluding employees from bringing an unfair dismissal claim if they had not completed a qualifying period of employment of six months.¹⁴³

While the economic merits of these changes have been hotly debated, what seems beyond question is that they were the undoing of the Government. The small business exemption from unfair dismissal laws galvanised huge opposition from unions and members of the public¹⁴⁴ and this ultimately resulted in the opposition Australian Labor Party being returned to power at the general election in 2007 on the back of a promise to roll-back the Work Choices reforms.

In November 2008, the Fair Work Bill was introduced to Parliament and was ultimately enacted as the *Fair Work Act 2009* (Cth) giving rise to the federal unfair dismissal laws that exist today.

¹⁴² Explanatory Memorandum, Workplace Relations Amendment (Work Choices) Bill 2005, 24-6.

¹⁴³ *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) sch 1, item 114.

¹⁴⁴ See, eg, Michael Bachelard, D D McNicoll, 'Angry nation takes to the streets', *The Australian* (Melbourne), 15 November 2005, 1-2: "Schools and factories will empty out, hospitals and power stations will operate with skeleton crews and even construction workers, under threat of heavy personal fines, will march today to express their fear and disgust at the Howard Government's Work Choices laws".

(d) *Summary of key points*

Some key points can be taken from this history in relation to the remedies regime that has applied to unfair dismissal claims brought in the Australian federal jurisdiction. First, reinstatement only became the primary or presumptive remedy in relation to an unfair dismissal claim in 1996 under the *Workplace Relations Act 1996* (Cth). Prior to that, the choice of remedy – compensation or reinstatement (or anything else deemed appropriate) – was entirely at the discretion of the decision-maker. Second, and similarly, the low cap on the amount of compensation that could be awarded to a successful claimant (equivalent to six months' wages or, latterly, remuneration) did not always exist. It was introduced in 1994 in the first major changes to the unfair dismissal laws that had been brought into the *Industrial Relations Act 1988* (Cth). Third, costs have never been available to a successful party in an unfair dismissal claim, other than in the most exceptional circumstances of an entirely frivolous or vexatious claim or defence being raised. Fourth, and finally, the history discloses that the coverage of the unfair dismissal protections has oscillated, sometimes dramatically, over time. The protections first covered a wide range of categories of employees, then began to cover fewer and fewer until the high watermark of the Work Choices reforms, before the pendulum swung back with the introduction of the current Fair Work Act.

Above all, what this history indicates is that the unfair dismissal regime that applies in Australia is open to change and, particularly in relation to remedies, options other than the current regime may be politically feasible to pursue.

3.0 AUSTRALIAN UNFAIR DISMISSAL LAWS IN PRACTICE – AN EMPIRICAL ANALYSIS

3.1 Introduction and overview

In order to assess whether or not the current remedy regime that applies to unfair dismissals in Australia could be improved upon, it is essential to obtain an understanding of how that regime is operating in practice. The purpose of this chapter is to provide that understanding. This chapter describes the methodology and results of a comprehensive empirical study that I have undertaken into all decisions relating to unfair dismissal applications that have been handed down by Fair Work Australia in the most recent financial year.

The results of the study show a significant divergence between the law as it is on the books and the law as it applies in practice. In particular, reinstatement is awarded as a remedy far less frequently in practice than the text of the legislation might suggest is likely. Further, where compensation is ordered as a remedy in lieu of reinstatement it is generally awarded in amounts significantly below what is an already low statutory cap. By drilling down into the data, it becomes apparent that these issues manifest themselves to a particularly acute degree in respect of self-represented applicants.

Applying a traditional economic decision-making model to this data, there is evidence that self-represented applicants are failing to settle unfair dismissal claims in circumstances where it would appear to be rational for them to do so.

Specifically, on the assumption that applicants seek to maximise the economic

benefits that will flow to them as a result of bringing their unfair dismissal claim, the data indicates that the average self-represented applicant who is currently proceeding to hearing would be better off settling their claim than proceeding to hearing. The data is consistent with a theory that self-represented applicants are declining to settle claims as a consequence of an unrealistically high expectation that they will be reinstated if they proceed to hearing.

The implications of these findings for the choice of remedy regime that should apply to unfair dismissal in Australia are considered in chapter 6.

3.2 Methodology for the empirical analysis

(a) Identifying the relevant decisions

In the period from 1 July 2010 to 30 June 2011, Fair Work Australia reported that 12,301 unfair dismissal applications made under the Fair Work Act were finalised.¹⁴⁵ Of these, the vast majority – 96% – were finalised by a settlement being negotiated between the parties rather than by a final decision being issued by Fair Work Australia.¹⁴⁶

To understand how the remedy regime for unfair dismissal is operating in practice, it is necessary to focus on the minority of applications that were not settled by the parties but were instead resolved by a decision of Fair Work Australia.¹⁴⁷ In order to identify those applications I relied upon a series of weekly reports published

¹⁴⁵ Commonwealth of Australia, above n 91, 12.

¹⁴⁶ Ibid.

¹⁴⁷ The implications of the high rate of settlement for the overall merits of the current remedy regime will be specifically considered in chapter 5.

by Fair Work Australia called the “FWA Bulletin”.¹⁴⁸ These reports contain catchword summaries of all decisions signed and filed by Members of Fair Work Australia in the preceding week. By reviewing these reports for the period 1 July 2010 to 30 June 2011 it was possible to identify all decisions that related to unfair dismissal applications made under the Fair Work Act during that period.

My review identified 512 decisions involving 552 unfair dismissal applications in total.¹⁴⁹ These included decisions that were:

- (a) interlocutory in nature (such as an application for an extension of time to file an unfair dismissal application);
- (b) substantive in nature (determining whether or not a particular dismissal was unfair and, if so, the appropriate remedy);
- (c) appeals (whether in relation to an interlocutory or substantive decision); and
- (d) applications for costs (following an interlocutory, substantive or appeal decision).

The Fair Work Act requires that all decisions made by Fair Work Australia relating to unfair dismissal applications, whether interim or final, must be in writing

¹⁴⁸ The reports are accessible on the Fair Work Australia website <<http://fwa.gov.au/index.cfm?pagename=cdrrsummaries>>.

¹⁴⁹ The discrepancy between the number of decisions and the number of applications relates to the fact that in some cases a single decision addressed multiple applications (for example, multiple employees brought unfair dismissal claims when they were dismissed on the basis of redundancy on the same day) and in other cases multiple decisions related to a single application (for example, there may have been an interlocutory decision, a substantive decision and an appeal in relation to one application).

and must be published by the tribunal on its website “as soon as practicable after making the decision”.¹⁵⁰ Accordingly, I was able to download and review each decision that I had identified as relevant from the FWA Bulletins.

(b) Recording relevant metrics

For each decision, I attempted to ascertain 30 different metrics for comparison and study. These metrics fell within the following eight categories:

- (a) case identification (case name and citation);
- (b) hearing details (length of hearing (interlocutory, substantive and appeal), identity of the Member of Fair Work Australia who made the decision, date of application, and date of decision);
- (c) employer details (whether or not the employer was a small business for the purpose of the Fair Work Act and the nature of the representation retained by the employer, if any, for the hearing);
- (d) employee details (the employee’s age, the representation they retained for the hearing, and the employee’s period of service with the employer);
- (e) jurisdictional issues (whether or not a jurisdictional objection was made by the employer and, if so, its nature and whether or not it was successful);

¹⁵⁰ *Fair Work Act 2009* (Cth) s 601(1)-(4).

- (f) substantive issues (whether or not Fair Work Australia considered there was a valid reason for the dismissal and whether or not the dismissal was found to be unfair);
- (g) remedy issues (whether or not a remedy was ordered and, if so, various metrics around the details of the remedy ordered); and
- (h) miscellaneous issues (whether or not the decision was appealed, whether or not an application for costs was made, and the outcome of each of these actions).

Obtaining information for each of the metrics for each decision was challenging because of a general lack of consistency in relation to the format and content of decisions. For the majority of the metrics, there was no real consistency as to whether or not the metric was reported at all and, if so, where it was reported in a decision and to what degree of specificity. For example, most decisions listed the date the employee commenced employment with the employer and the date on which the employee was dismissed, enabling a precise calculation of the period of service to be generated and recorded. However, some decisions failed to report the period of service at all and other decisions reported the period of service in less precise terms (for example, 'the applicant was employed for over 20 years').

As such, an issue arose as to how best to record the metrics in these circumstances. The approach that I adopted was to record as much information as possible but to err on the side of conservatism. Accordingly, if the metric was not reported at all, I recorded 'Unknown' in the relevant cell on the spread sheet. If the

metric was stated in vague terms, I recorded the most conservative result consistent with what had been stated. Thus, if the decision stated that 'the applicant was employed for over 20 years' I recorded the period of service as being 20 years. Where these limitations in the data could impact on my findings, I have specifically noted this.

Three other recording challenges that require explanation relate to hearing days. First, where a single decision addressed more than one application, I divided the number of hearing days by the number of applications dealt with in the hearing and recorded the result as the number of hearing days taken in respect of each application. For example, if a decision relating to two applications involved six hearing days, I recorded that each application was heard for three hearing days. This was necessary to ensure that any relevant averages that might be calculated based on the data (such as the average number of hearing days taken to resolve an application) would be valid.

Second, I assumed that applications occupied full days of hearings. That is, if a hearing was reported as having taken place on, for example, 2 and 3 March 2011, I recorded the hearing as lasting two days. In most cases, this approach will be an overestimate of the true amount of time taken up by a hearing. This is because it is to be expected that most hearings concluded at some point prior to the end of the day. Thus, in relation to the example given above, the hearing may only have taken one and a half days rather than two full days. However, the approach I adopted to recording hearing days was necessary because:

- the decisions did not report the number of hearing days in increments smaller than days; and
- for hearings that took place within one hearing day, rounding down, as a conservative approach might suggest, would have confused applications which required hearings with those that were able to be decided “on the papers” without the need for a hearing at all.

Again, to the extent that this approach to recording could impact on the findings I have reached, I have specifically noted this.

Third, in respect of 12 of the applications, it was clear that a hearing had taken place (rather than the application being decided “on the papers”) but it was not possible to determine from the decisions how many hearing days were occupied by the application. For these applications I have taken the conservative assumption that each application was resolved in one hearing day.

(c) *Consolidating the data*

Having obtained data in respect of every relevant *decision* in the period under study, it was then necessary to consolidate that data so that there was a single aggregate set of data for each *application* resolved by decision during the period.

This involved a number of steps. First, I excluded all decisions from my analysis that related to an application that was not finally resolved by a decision during the period. For example, I excluded decisions of an interlocutory nature that

did not dispose of the matter if a substantive decision in relation to the application did not also take place within the period.

Second, where an application had been apparently resolved by a decision within the period but subsequently an appeal had been lodged which had not been decided within the period, I did not exclude the application from the analysis but undertook further investigations. If the appeal had been subsequently determined, I recorded the relevant information arising out of the appeal in the spread sheet. If the appeal had not been determined at the time of writing, I did not exclude the application on the basis of the principle that a decision stands unless and until it is set aside on appeal. Taking this approach was also justified by the fact that it is likely that the appeals in these cases were ultimately discontinued, given that a substantial period of time has passed since the appeal was lodged¹⁵¹ and no decision has yet been issued. On the other hand, I excluded decisions that were set aside on appeal and remitted to the first instance Member for reconsideration about some matter if that reconsideration was not finalised during the period. This was consistent with the scope of my study being limited to applications that were substantively resolved by Fair Work Australia during the 2010-2011 financial year.

Third, I consolidated the decisions such that the outcomes of any and all interlocutory, substantive, appeal and costs decisions in relation to a single application were recorded in one row of the spread sheet that related to that application. As such, each row of the spread sheet shows the final result that was

¹⁵¹ At the time of writing, April 2012, a minimum of ten months has passed since the lodging of the appeal without a decision on the appeal being issued.

reached in relation to the application. Accordingly, if an application was found to involve an unfair dismissal by the first instance Member but this finding was reversed on appeal, the row of the spread sheet pertaining to that application records the ultimate result that there was no unfair dismissal. This is consistent with the focus of my study being on the ultimate outcome of applications and avoids any risk of double-counting applications in analysing the data.

The ultimate outcome of this process of exclusion and consolidation of the original 512 decisions relating to unfair dismissal applications within the period was a spread sheet of data in respect of all 398 unfair dismissal applications that were resolved by a decision of Fair Work Australia between 1 July 2010 and 30 June 2011.¹⁵² A copy of a table summarising the key components of the spread sheet is included at Appendix A to this thesis.¹⁵³

3.3 Findings

Due to the detailed nature of the data I obtained about each decision encapsulated by the study, it is possible to analyse the data from a wide range of

¹⁵² Fair Work Australia's Annual Report for 2010-2011 states that 517 applications were "finalised by decision" during the period: Commonwealth of Australia, above n 91, 12. Based on the decisions reported in the FWA Bulletins during the period which were used for the purposes of this thesis, that figure does not appear to be correct. One or more of the following reasons may explain the discrepancy between the figure reported by Fair Work Australia (517) and the figure I have determined (398): (i) not all decisions made by Fair Work Australia are being published as required by the Fair Work Act; (ii) the FWA Bulletins are not comprehensively reporting all decisions; (iii) Fair Work Australia is double-counting some applications in its reporting (for example, those resolved at first instance and then considered again on appeal); (iv) Fair Work Australia is applying a different meaning to "finalised by decision" from the meaning I have applied to that phrase for the purposes of this thesis; or (v) the number 517 reported in the annual report by Fair Work Australia is simply an error. I have written to Fair Work Australia regarding this issue but have yet to receive any response.

¹⁵³ Due to its size, a complete copy of the spread sheet could not be included as an annexure. However, a complete, electronic copy can be obtained from the author on request.

perspectives for myriad purposes.¹⁵⁴ For the purposes of this thesis – with its focus on the operation of the remedy regime for unfair dismissal in Australia – the analysis of the data is targeted at the outcome of applications, the remedies that were awarded when applications were successful, and the factors at play that may explain why these applications proceeded to hearing when the majority of applications were settled.

(a) *Outcomes of applications*

The most fundamental issue in relation to the outcome of an unfair dismissal application is whether or not the dismissed employee is successful in establishing that their dismissal was unfair. Table 1 below summarises the outcomes of applications in relation to this basic fact during the period.

Table 1: Outcome of all applications

	Applications	%
Dismissal held to be unfair	120	30
Dismissal held to be fair	278	70
Total	398	100

This indicates that employers won in 70 per cent of the applications resolved by decision in the period. However, this figure arguably paints a misleading picture

¹⁵⁴

For example, an interested analyst could examine whether particular Members of Fair Work Australia found in favour of the employer more frequently than others or examine whether the length of a hearing has any predictive capacity in relation to ultimate outcome that is reached. Given the previous calls for more empirical data in the literature, it is hoped that other scholars will be able to use the data produced by this study for such varied purposes in the future.

of the true situation as the 398 applications in the study include a significant number of applications (24) that were initially lodged but subsequently not pursued.

Ultimately, these applications were dismissed by Fair Work Australia for want of prosecution.

In these circumstances, Table 2 below may represent a fairer picture of the relative success dismissed employees enjoyed in pursuing unfair dismissal applications by excluding from the analysis applications that were dismissed for want of prosecution.

Table 2: Outcome of all applications excluding applications dismissed for want of prosecution

	Applications	%
Dismissal held to be unfair	120	32
Dismissal held to be fair	254	68
Total	374	100

Excluding applications that were not ultimately pursued by the employee, of the remaining applications employers won 68 per cent of the time. Again, this might not represent a fair assessment of the average employee's chance of succeeding in an unfair dismissal claim. Of the 374 applications that were not dismissed for want of prosecution, 143 were dismissed on jurisdictional grounds. A significant number of these (45) were dismissed because the application was lodged after the statutorily prescribed period and Fair Work Australia did not exercise its discretion to extend the time for lodgement in the particular case. The prescribed period for lodgement

under the Fair Work Act – 14 days after the day of dismissal – represented a reduction of 7 days from the prescribed period that applied prior to the commencement of the Fair Work Act on 1 July 2009. Furthermore, Fair Work Australia’s ability to exercise a discretion to extend time in circumstances of late lodgement was significantly curtailed under the Fair Work Act, relative to the position that existed under the previous statute. Such changes to the way in which the unfair dismissal process operates take time to penetrate public consciousness and, as such, it is unsurprising that there were a relatively large number of applications dismissed on the basis of being lodged out of time during the period under analysis.

In recognition of this issue, Table 3 below shows the outcomes of applications excluding both those dismissed for want of prosecution and those dismissed because they were filed after the prescribed period.

Table 3: Outcome of all applications excluding applications dismissed for want of prosecution or for being filed after the prescribed period

	Applications	%
Dismissal held to be unfair	120	37
Dismissal held to be fair	209	63
Total	329	100

Excluding these applications that either were not pursued or had (essentially) no prospects of success because they were lodged out of time, of the remaining applications employers won 63 per cent of the time.

Completing the analysis of outcomes at this general level, Table 4 below shows the relative success employers and employees had when applications proceeded to the stage of being determined on the merits. That is, Table 4 excludes all applications that were dismissed for want of prosecution or on jurisdictional grounds.¹⁵⁵

Table 4: Outcome of all applications excluding applications dismissed for want of prosecution or on jurisdictional grounds

	Applications	%
Dismissal held to be unfair	120	52
Dismissal held to be fair	111	48
Total	231	100

When applications proceeded to a determination on the merits, employers won 48 per cent of the time. This suggests that in respect of the average application that proceeded to the point of being heard on the merits, the merits were likely to be finely balanced.

¹⁵⁵

Jurisdictional grounds constituted the following: (i) the application was lodged after the prescribed period and an extension of time was not granted; (ii) the applicant was not an employee of the respondent; (iii) there was no dismissal at the initiative of the employer; (iv) the employee had not been employed for the minimum employment period prescribed by the Fair Work Act; (v) the employee's earnings were in excess of the high income threshold and the employee was not covered by an award or enterprise agreement; (vi) the dismissal was a case of genuine redundancy; (vii) the application was not permitted because the employee already had a proceeding of a different kind in relation to the dismissal on foot; (viii) the employer was a small business for the purposes of the Fair Work Act and the dismissal complied with the statutory Small Business Dismissal Code; (ix) the employer was in administration and the commencement of tribunal proceedings against the employer thus required the leave of the Federal Court of Australia which had not been granted. See *Fair Work Act 2009* (Cth) ss 382-3, 385-6, 388-9; *Corporations Act 2001* (Cth) s 500(2).

(b) *Remedies ordered when dismissed employees are successful at hearing*

When dismissed employees are successful in establishing that their dismissal was unfair, Fair Work Australia is empowered, although not compelled, to order a remedy. In practice, there were no cases in the study for which Fair Work Australia determined that a dismissal was unfair yet refrained from awarding a remedy.

As discussed in chapter 2, the Fair Work Act puts significant emphasis on reinstatement as the primary remedy for unfair dismissals. Only in circumstances where reinstatement is considered to be inappropriate is Fair Work Australia authorised to consider ordering compensation in lieu of reinstatement. Accordingly, it is interesting to examine the data to see the frequency with which reinstatement is awarded in practice.

Table 5 below shows the frequency of the remedies that were awarded in respect of all of the applications decided within the period.

Table 5: Remedy ordered in respect of applications decided within the period

	Applications	%
No remedy	278	70
Reinstatement	21	5
Compensation	99	25
Total	398	100

The data indicates that in respect of all applications that were resolved by a decision of Fair Work Australia during the period, in only 5 per cent of cases was the applicant reinstated to their previous employment. Given the emphasis that is

placed on reinstatement as the primary remedy in the legislation, this result appears surprising. However, it appears to be consistent with a historical trend when the result is compared to the reported outcome of cases published by Fair Work Australia and its predecessor tribunal in annual reports in respect of the previous five years. Table 6 summarises the results of my study in relation to the frequency of reinstatement being ordered as against the published rates of reinstatement for the previous five years.

Table 6: Historical frequency of reinstatement being ordered as a remedy

	% of applications for which reinstatement was ordered
2010/11	5
2009/10	4 ¹⁵⁶
2008/09	2 ¹⁵⁷
2007/08	3 ¹⁵⁸
2006/07	2 ¹⁵⁹
2005/06	5 ¹⁶⁰
Average	4

However, considered in isolation, these figures may be somewhat misleading. When considering the operation of a remedy regime, what is significant is not so much how often a particular remedy is ordered out of all the applications

¹⁵⁶ Commonwealth of Australia, above n 111, 14.

¹⁵⁷ Commonwealth of Australia, *Annual Report of the President of the Australian Industrial Relations Commission and Annual Report of the Australian Industrial Registry – 1 July 2008 to 30 June 2009* (Document Printing Australia, 2009) 11.

¹⁵⁸ Ibid (the Annual Report also provides historical data).

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

that were lodged, but how often a particular remedy is ordered *out of those applications where the applicant was successful*. This is because, obviously, it is only in these latter cases that a remedy can be awarded at all.

Table 7 below shows the remedies that were ordered in the period 1 July 2010 to 30 June 2011 in respect of applications where the dismissed employee was successful in establishing that their dismissal was unfair.

Table 7: Remedy ordered in respect of applications where the dismissal was held to be unfair

	Applications	%
Reinstatement	21	17
Compensation	99	83
Total	120	100

During the period, applicants who were successful in establishing that their dismissal was unfair were reinstated to their former employment 17 per cent of the time. Thus, compensation, not reinstatement, is clearly the primary remedy ordered in practice.¹⁶¹

It is useful to drill down further into these results. Considering reinstatement first, Table 8 below shows the frequency with which back pay was ordered in addition to reinstatement.

¹⁶¹ Karen Wheelright, albeit discussing an earlier iteration of the remedy regime under the *Workplace Relations Act 1996* (Cth) summarised the situation as follows: “Reinstatement is the ‘primary’ remedy under the Act, only in the sense that reinstatement must be considered *first*.” See Wheelright, above n 24, 179.

Table 8: Frequency with which back pay was ordered in addition to reinstatement

	Applications	%
Back pay	17	81
No back pay	4	19
Total	21	100

In respect of 17 of the 21 applications where reinstatement was ordered, back pay was ordered as well. The data reveals that in 9 of these 17 cases the amount of back pay was the maximum possible – that is, the employer was required to pay the reinstated employee back pay for the full period between the date of dismissal and the date of reinstatement. In six of the remaining eight cases, the amount of back pay was explicitly discounted because of the employee's misconduct which contributed to the employer's decision to dismiss the employee. In the final two cases, back pay was ordered for a specified period of weeks that was less than the period between dismissal and reinstatement for various factors not related to misconduct that were particular to the circumstances of each case.¹⁶²

In 12 of the cases in which back pay was ordered, the dollar amount of back pay was not specified in the decision or the corresponding order made by Fair Work Australia. Nor was there sufficient information provided in the decisions to extrapolate the quantum of back pay ordered. As such, it is not possible to

¹⁶²

In the first case, *Mr Cliff Jones v BHP Billiton Iron Ore Pty Ltd* [2010] FWA 6959 there was a three month delay in the hearing of the matter at the request of the dismissed employee. In that case, the employee did not receive back pay in respect of that period of delay. In the second case, *Flavio Sepe v Ezygas Conversions Aust. Pty Ltd T/A Ezygas* [2010] FWA 8891 the employer had gone into voluntary administration during the period between the dismissal and the hearing. In that case, back pay was awarded for the period between the dismissal and the date when the company entered administration.

comprehensively assess the dollar value of back pay ordered. Nonetheless, in the five cases where the dollar amount of back pay was specified, the amounts ordered ranged from \$4,500 to \$18,332.25, with the average being \$12,514.79.

If we now turn away from the data in relation to reinstatement and instead consider compensation, there is a significantly larger data set from which to work. First, we will consider the range of compensation orders made. Ninety-nine applications resulted in compensation being awarded to the dismissed employee in lieu of reinstatement. Similar to the situation that arose with back pay, compensation orders were sometimes specified in dollar amounts and sometimes specified in weeks' pay. In cases where the compensation was specified only in weeks, where possible, I extrapolated the dollar amount of compensation from information that was given in the decision regarding the dismissed employee's weekly pay prior to dismissal. Similarly, where compensation was specified only in dollars, where possible I extrapolated the number of weeks' pay that this represented from other details given in the decision. Accordingly, of the 99 applications which resulted in compensation being awarded, I have data in relation to the number of weeks' pay ordered in 89 cases and data in relation to the dollar amounts ordered in 76 cases.

Table 9 below sets out the frequency of compensation orders that fell into various ranges of dollar amounts.

Table 9: Frequency of compensation amounts

Compensation Range	Applications	%
\$1 - \$4,999	28	37
\$5,000 - \$9,999	15	20
\$10,000 - \$14,999	10	13
\$15,000 - \$19,999	10	13
\$20,000 - \$24,999	4	5
\$25,000 - \$29,999	6	8
\$30,000 - \$34,999	1	1
≥ \$35,000	2	3
Total	76	100

Table 9 above indicates that in 83 per cent of cases the amount of compensation ordered was less than \$20,000 and in only 4 per cent of cases did the amount of compensation exceed \$30,000.

The amounts of compensation that were ordered varied from as little as \$171 in one case to as much as \$47,500 in another. The average amount of compensation ordered was \$11,244.19.

Considering the statutory cap, the effect of which is that the compensation ordered cannot exceed the amount of remuneration the employee was entitled to receive in the 26 weeks preceding their dismissal, Table 10 below shows the range of compensation orders measured by the number of weeks' remuneration they represented.

Table 10: Frequency of compensation weeks

Compensation Range	Applications	%
< 3 weeks	7	8
3 weeks – 5.99 weeks	27	30
6 weeks – 8.99 weeks	14	16
9 weeks – 11.99 weeks	9	10
12 weeks – 14.99 weeks	6	7
15 weeks – 17.99 weeks	6	7
18 weeks – 20.99 weeks	4	4
21 weeks – 23.99 weeks	1	1
24 weeks – 26 weeks	15	17
Total	89	100

This indicates that in 71 per cent of cases in which compensation was awarded, the amount of compensation was equivalent to less than 16 weeks' pay. Although not discernible from Table 10 above, the data also reveals that the maximum compensation allowable under the Fair Work Act was awarded in respect of 13 applications. This means that, in relation to the 89 applications for which we have relevant data, in approximately 15 per cent of cases where an applicant was awarded compensation in lieu of reinstatement, the amount of compensation that was awarded was the maximum amount permitted under the Act.

(c) The length of hearings and the representation of the parties

In relation to each application, I obtained data on the length of the hearings that were involved in resolving the application and the form of representation that each party used during those hearings. This information is relevant to evaluating the

decision by particular applicants to proceed to hearing in light of the costs and expected outcomes.

Table 11 below shows the frequency of applications being dealt with by hearings across various ranges of days.

Table 11: Frequency of number of days of hearing

Days of hearing	Applications	%
Zero (decided on the papers)	24	6
One	217	55
Two	108	27
Three	25	6
Four	16	4
Five	3	1
Six	3	1
> Six	2	1
Total	398	101¹⁶³

Of the applications resolved by decision during the period, 349 applications (equivalent to 88 per cent) involved less than three days of hearing and the majority were resolved in one day. It is important to note that the figures in Table 11 above include any hearing days occupied by interlocutory matters prior to the substantive decision as well as any hearing days occupied by appeals or applications for costs after the substantive decision had been made. All of these hearing days were involved in leading to the final result that was obtained in respect of the application

¹⁶³ The total percentage is 101 rather than 100 due to rounding the individual percentages in the table to whole numbers.

and it is for that reason that they are included. While Table 11 indicates that there were a few applications that occupied a significantly greater number of hearing days, the average number of hearing days occupied by an application was 1.53.

Turning to the issue of representation of the parties at hearing, Table 12 below summarises the data.

Table 12: Representation at hearings

	Employer		Dismissed employee	
	Applications	%	Applications	%
Self-represented	126	32	170	43
Lawyer	180	45	97	24
Union / Industry group	31	8	62	16
Industrial relations consultant	5	1	16	4
Did not appear	45	11	41	10
Unknown	11	3	12	3
Total	398	100	398	100

This indicates that during the period under study, employers were represented by lawyers at hearings almost twice as often as dismissed employees were. On the other hand, dismissed employees were represented by unions twice as often as employers were represented by (equivalent) industry groups. There was also a significant number of cases in which dismissed employees and employers represented themselves during hearings.

For employers, there is some possibility that being “self-represented” may have meant that they were being represented by a lawyer but one who was employed as in-house counsel. However, the extent to which this occurred is likely to be limited as few employers are large enough to employ in-house counsel and the very large employers who were involved in unfair dismissal applications during the period (such as BHP Billiton and Qantas) retained external lawyers to represent them at hearings.¹⁶⁴ Similarly, there is some possibility that dismissed employees who were represented by unions were represented by in-house counsel employed by the union.

Regardless, what is significant for the purposes of this thesis is the costs incurred by parties in proceeding to hearing with the representation that they retained. As there is no extra cost to a party involved in using in-house counsel, using in-house counsel is equivalent to being self-represented from the perspective of cost.

Drilling down further into the data, it is possible to see how the outcome of cases correlated with the representation of the parties. Table 13 below shows the relative success of employers and dismissed employees in various combinations of representation.

¹⁶⁴ See *Mr Paul Warner Dobson v Qantas Airways Limited* [2010] FWA 6431; *David Tregear v Qantas Airways Limited* [2010] FWA 8985; *Ms Michelle Holland v Qantas Airways Limited* [2011] FWA 3778; *Mr Cliff Jones v BHP Billiton Iron Ore Pty Ltd* [2010] FWA 6959; *Mr Neville Hampton v BHP Billiton Pty Ltd* [2011] FWA 3335.

Table 13: Comparison of respective outcomes based on representation at hearings

	Employer wins		Dismissed employee wins	
	Applications	%	Applications	%
Both parties represented	88	65	47	35
Both parties represented by lawyers	47	64	27	36
Both parties self-represented	53	61	34	39
Employer represented, dismissed employee self-represented	54	81	13	19
Employer represented by lawyer, dismissed employee self-represented	43	84	8	16
Employer self-represented, dismissed employee represented	21	64	12	36
Employer self-represented, dismissed employee represented by lawyer	11	73	4	27

When the parties were evenly matched when it came to representation, there was little difference in the percentage of applications won by the respective parties regardless of the nature of the representation used. The percentage of applications won by the employer ranged between 61 and 65 per cent.

As might be expected, when “mismatches” arose in the employer’s favour (that is, the employer was represented and the dismissed employee was not), the employer was successful in defending the unfair dismissal application far more frequently. The percentage of decisions in favour of the employer in these circumstances ranged from 81 to 84 per cent.

However, the reverse did not hold true. That is, if there was a mismatch in the employee's favour (that is, the employee was represented but the employer was not) the employee did not win more frequently than when both parties were "equally matched". The employer's win percentage in these circumstances ranged from 64 to 73 per cent. However, this result may be affected by the relatively small sample size involved – there were only 33 cases where the employee was represented but the employer was not. It may also be explained by the fact self-represented employers are more likely to have experience in responding to unfair dismissal and other similar claims (including possibly with in-house counsel) than an individual dismissed employee.

If self-represented applicants are viewed as a class, Table 13 reveals that they were successful in 47 out of 154 claims. This equates to approximately 31 per cent of the time.

(d) The special case of the self-represented applicant

The data described in the preceding section showed that self-represented applicants tended to have less success in establishing that their dismissal was unfair at hearing compared to their represented counterparts. In a jurisdiction where self-representation is encouraged,¹⁶⁵ this finding may be viewed as concerning, although not particularly surprising to those who practice in the field.

¹⁶⁵

Under the Fair Work Act, there is a presumption that parties will be self-represented in hearings before Fair Work Australia to the extent that a party is prevented from having a lawyer or other paid agent to appear on their behalf unless the tribunal first grants permission for this to occur. Section 596 of the Act provides that this permission may be granted only if: (a) it would enable the matter to be dealt with more efficiently, taking into account the

Delving further into the data, the impact of representation is not limited to the applicant's overall likelihood of achieving a successful outcome in an unfair dismissal claim but extends to the quality of the remedy they receive.

That is, even where self-represented applicants overcame the initial hurdle of establishing that their dismissal was unfair, the remedies that they received were not as favourable as those received by applicants who had representation.

Summarising the data, Table 14 below compares the remedies received by self-represented applicants who were successful in establishing that their dismissal was unfair against the remedies received by successful applicants who were represented.

complexity of the matter; or (b) it would be unfair not to allow the person to be represented because the person is unable to represent himself, herself or itself effectively; or (c) it would be unfair not to allow the person to be represented taking into account fairness between the person and other persons in the same matter.

Table 14: Summary of remedies awarded to self-represented applicants as against those awarded to represented applicants

	Self-represented applicants	Represented applicants
Reinstatement	0	21
- <i>Range of back pay</i>	N/A	\$4,500 to \$18,332.25
- <i>Average back pay</i>	N/A	\$12,514.79
Compensation	54	45
- <i>Range of compensation</i>	\$171 - \$35,000	\$1,050 - \$47,500
- <i>Average compensation</i>	\$9,140.60	\$12,565.90
Total applications	54	66

Table 14 above places in stark relief the fact that not a single self-represented applicant was successful in being awarded reinstatement to their former employment during the period under study. Represented applicants were far more successful in this regard with slightly less than one third of represented applicants who received a remedy being reinstated.

Of course, whether or not this is a cause for concern depends on whether or not applicants generally wished to be reinstated. For example, if all of the successful self-represented applicants preferred compensation over reinstatement, then the fact that reinstatement was never ordered could be viewed as a good thing. Unfortunately, in a significant number of decisions, even where the applicant was successful, the applicant's preferences for a particular remedy were not disclosed in the decision. This means that the data that was able to be collected in relation to this issue has significant gaps and thus analysis of this issue must be largely

speculative. In respect of self-represented applicants who were successful at hearing, remedy preference was not revealed in 15 cases (which equates to approximately 28 per cent of cases). Four self-represented applicants were identified as specifically seeking reinstatement and were nonetheless given compensation in lieu of reinstatement. Taken together, this means as many as 35 per cent of successful self-represented applicants may have preferred reinstatement as a remedy but were awarded compensation. Conversely, if all of the applicants for which data is not available would have preferred compensation over reinstatement as a remedy, it is possible that as few as 7 per cent of self-represented applicants may have wanted to be reinstated. Regardless, what is clear from the data is that no self-represented applicants were in fact reinstated.

Turning to compensation, the average compensation received by represented applicants in lieu of reinstatement (\$12,565.90) was more than 35 per cent higher than the average compensation received by self-represented applicants (\$9,140.60).

Taken together, these findings indicate that successful self-represented applicants did considerably worse when it came to remedy than applicants who retained representatives for hearings. More significantly, given the complete lack of reinstatement awards made in respect of self-represented litigants and the relatively derisory average amount of compensation awarded in lieu of reinstatement where these applicants were found to have been unfairly dismissed, the findings raise the question of whether self-represented applicants would have been better off agreeing to settle their claim rather than proceeding to hearing. To consider that issue, and determine whether the average self-represented applicant is rejecting settlement

offers that it would be economically rational for them to accept, it is useful to draw upon a model to represent the decision regarding whether or not to settle. This will be the focus of the next chapter.

4.0 MODELLING THE DECISION TO SETTLE – THE CASE OF THE SELF-REPRESENTED APPLICANT

4.1 The decision to settle from the perspective of the dismissed employee

This model will proceed on the traditional assumptions in economics that litigants are risk neutral, economically rational actors.¹⁶⁶ In this context, this means that applicants are interested in maximising the economic value of the outcome of their unfair dismissal claim. Accordingly, an applicant will elect to settle their unfair dismissal claim if:

$\text{Value of settlement} \geq \text{Expected value of proceeding to hearing}$
--

The value of settlement is, in most cases, the amount of dollars the employer is willing to offer the applicant to discontinue the claim. It is possible that the settlement may involve elements in addition to a payment that are regarded as valuable by the applicant, such as the provision of a statement of service to assist the applicant in obtaining future employment elsewhere. However, in most cases, the dollar amount offered by the employer will dictate the value of the settlement to the applicant.

The expected value of proceeding to hearing is a function of the value of the remedy the applicant can expect to receive if they proceed to a hearing. The remedy that an applicant can expect to receive depends upon a number of factors.

¹⁶⁶ See, eg, Shavell, above n 6, 401-3. The assumption of economic rationality can be criticised on the basis that some dismissed employees may have motivations other than maximising their economic outcome when deciding whether or not to settle an unfair dismissal claim. This issue is addressed below in section 4.4 of this thesis.

First, it depends upon the applicant establishing that their dismissal was unfair – that is, it depends upon the probability that the applicant will win their case. Second, assuming the applicant wins, it depends upon the likelihood that the applicant will be awarded a particular remedy and then the value of that remedy. In the context of unfair dismissal, there is some probability that the applicant may be reinstated (an outcome to which the applicant would attribute some value) and some probability that the applicant will receive compensation in lieu of reinstatement (the value of which would reflect the dollar amount of compensation ordered). Third, to the extent that the applicant incurs any costs by proceeding to hearing, these must be deducted from the expected value of the remedy the applicant will receive to result in the total expected value of proceeding to hearing.

Expressing these factors as a formula, an applicant will elect to settle their unfair dismissal claim if:

<i>Value of settlement</i>	\geq	<i>Expected value of proceeding to hearing</i>
$= \$ \text{ offered by employer}$	\geq	$P_{win} \times (P_{reinst} \times V_{reinst} + P_{comp} \times V_{comp}) - C_{ap}$

In the formula above:

- P_{win} represents the probability of the applicant winning;
- P_{reinst} represents the probability of the applicant being reinstated if they win;
- V_{reinst} represents the value of reinstatement to the applicant;

- P_{comp} represents the probability of the applicant receiving compensation if they win;
- V_{comp} represents the value of compensation that the applicant expects to be awarded if they receive compensation in lieu of reinstatement; and
- C_{ap} represents the costs incurred by the applicant in proceeding to hearing.

By having recourse to the data, it is possible to determine appropriate values for each of these elements of the formula for the average self-represented applicant.

(a) *Determining the values of each variable in the model*

To begin with, self-represented applicants were successful in establishing that their dismissal was unfair (and, hence, in obtaining a remedy) in approximately 31 per cent of cases. While in any particular case the probability of the applicant succeeding at hearing depends upon the merits of their individual case, the sample size is large enough for a normal distribution to be reasonably assumed.¹⁶⁷ As such, it can be concluded that for the average self-represented applicant the merits of their case will reflect the average merits of all of those in the sample. As such, a reasonable estimation of P_{win} for the average self-represented applicant is 0.31 or 31 per cent.

¹⁶⁷ For a useful discussion of normal distributions, central limit theorems and their relationship to sample size, see Michael O Finkelstein and Bruce Levin, *Statistics for Lawyers* (Springer, 2001) 113-16.

Turning to remedy, where self-represented applicants were successful in establishing that their dismissal was unfair, none were reinstated and all were awarded compensation in lieu of reinstatement. Thus, the data indicates that for the average self-represented applicant, a reasonable estimation of P_{reinst} is something very close to zero, say 0.01 or 1 per cent. That is, based on the data, the likelihood of the average self-represented litigant being reinstated is minimal. Since, if reinstatement is not awarded, Fair Work Australia will order compensation in lieu of reinstatement, it follows that a reasonable estimation of P_{comp} is something very close to one, say 0.99 or 99 per cent.

The average value of compensation received by self-represented applicants was \$9,140.60. Accordingly, for the average self-represented applicant, a reasonable estimation of V_{comp} is \$9,140.60.

Finally, since the applicants we are concerned with are self-represented and Fair Work Australia can only order the losing party pay the winning party's costs in the most exceptional of circumstances, it is reasonable to assume that the expected costs incurred by a self-represented applicant by proceeding to hearing are zero.¹⁶⁸ As such, for the average self-represented applicant, a reasonable estimation of C_{ap} is 0.

¹⁶⁸ Of course, this assumes that the applicant does not attribute any value to their time in preparing for and litigating the claim. While this is unrealistic, it helps to ensure that the outcome of the formula is a conservative one whereby the formula will be more likely to suggest that rational self-represented applicants should proceed to hearing as it appears that they do in practice.

Substituting these values into the formula, the average self-represented applicant will elect to settle if:

<i>Value of settlement</i>	\geq	<i>Expected value of proceeding to hearing</i>
$= \$ \text{ offered by employer}$	\geq	$P_{win} \times (P_{reinst} \times V_{reinst} + P_{comp} \times V_{comp}) - C_{ap}$
$= \$ \text{ offered by employer}$	\geq	$0.31 \times (0.01 \times V_{reinst} + 0.99 \times \$9,140.60) - 0$
$= \$ \text{ offered by employer}$	\geq	$0.31 \times (0.01 \times V_{reinst} + \$9,049.19)$

The problem that remains is attempting to reasonably estimate V_{reinst} – the value that the average self-represented applicant will attribute to reinstatement as a remedy.

(b) *Valuing reinstatement*

The value of reinstatement depends on the employment alternatives available to the applicant. For some applicants, the value of a reinstatement order may be zero. This would be the case if the applicant had obtained a higher paying or otherwise more desirable job after being dismissed from their previous employment in relation to which they are bringing their unfair dismissal claim.¹⁶⁹ An order of reinstatement would be valueless to such applicants if, as is likely, they would prefer to retain their new job rather than return to their old one.¹⁷⁰

¹⁶⁹ For a classic example of where this occurred, see: *Paddick v Siddons Ramset Ltd* (Dec 298/98 M Print P9338).

¹⁷⁰ In the Australian context, other than in a dwindling number of exceptional cases, there is no formal concept of seniority in employment contracts or collective agreements. That is, there is no concept of increasing benefits commensurate with length of service that could otherwise be a factor weighing against the conclusion that an employee would generally prefer a new

On the other hand, some applicants may value reinstatement very highly on the basis that they may have real difficulty obtaining similarly paid alternative employment elsewhere. For example, consider a dismissed employee who was just a few years off retirement and now is unlikely to ever obtain another job. Or consider a dismissed employee who had a particularly specialised skill set that was of significant value in their previous employment but is unlikely to be of value to other potential employers (perhaps they were a technical expert in relation to an invention over which their previous employer holds the patent). Or consider a dismissed employee who saw their job as their vocation and their dismissal means that they can no longer easily work in that field (for example, a public school teacher dismissed by the Department of Education in their state). In each case, the substitution possibilities are limited and the dismissed employee may need to accept significantly lower paid work for a period, move interstate, or retrain into a new field in order to adequately provide for themselves.

However, even in these cases, it is important not to overstate the dollar value that should be attributed to reinstatement as a remedy. For example, consider a dismissed employee who obtains alternative employment at a significantly lower position with another employer, only earning half their previous salary, and then has

higher paying job over their previous lower paying job. For example, retirement benefits in Australia are accumulated through employer contributions to a fund that is personal to the employee regardless of their employer. Employers do not pay employees who retire pensions based on their length of service. Similarly, in Australia there is no concept of employees contributing towards unemployment insurance or of employer provided health insurance as exists in the United States. In Australia, the only accumulated benefit that an employee is likely to forego on ending their employment with one employer is any accumulated personal leave (that is, essentially, sick leave). On commencing their new employment, employees are entitled to personal leave in accordance with the relevant provisions of the Fair Work Act.

to gradually work their way up until after five years they are earning the same salary as prior to their unfair dismissal. On the scale of possible outcomes from an unfair dismissal this scenario would appear to be at the more serious end. Yet, the financial loss that the dismissed employee suffers (and thus the value that this dismissed employee should place on reinstatement) is surprisingly modest despite the circumstances – it is equivalent to only one and a half year’s salary at the pre-dismissal level. Table 15 below provides an illustration of this in respect of a dismissed employee who was established in a position earning a salary of \$100,000, now can only obtain lower level employment that pays \$50,000 per year and must gradually work their way back up until they again earn their pre-dismissal salary.

Table 15: Illustration of the value of reinstatement

	Year 0	Year 1	Year 2	Year 3	Year 4	Year 5	Total
Salary from new employment (\$)	50,000	60,000	70,000	80,000	90,000	100,000	450,000
Salary employee previously received (\$)	100,000	100,000	100,000	100,000	100,000	100,000	600,000
Difference requiring compensation (\$)	50,000	40,000	30,000	20,000	10,000	0	150,000

Thus, in the example above, the objective value of reinstatement to the dismissed employee is \$150,000. Some obvious criticisms can be made of this example, such that it assumes the dismissed employee’s income would have remained static at their previous employment which might not be realistic. On the

other hand, the example ignores the vicissitudes of life that may mean the employee would not have remained in their previous employment because of redundancy or other circumstances. Regardless, the example serves to illustrate the overall point that a relatively modest dollar value can reasonably be attributed to reinstatement even in circumstances where the consequences of dismissal for the employee are quite severe.

Nonetheless, for the purpose of this exercise, it is appropriate to adopt a conservative approach of potentially overvaluing reinstatement to the average self-represented applicant. If such an approach is taken and it still appears that self-represented applicants are irrationally rejecting settlement offers, greater confidence can be had that this perceived problem does indeed exist.

Adopting this approach, and remembering that some dismissed employees will value reinstatement at zero or some other very low value, I propose to value reinstatement for the average self-represented unfairly dismissed employee as equivalent to three year's income. In Australia, the most recently published statistics put the average weekly earnings of adult employees employed on a full-time basis at \$1,322.60.¹⁷¹ Accordingly, multiplying this figure by the 156 weeks in three years, I propose that V_{reinst} be given the value of \$206,325.60.

Substituting this values into the formula, the average self-represented applicant will elect to settle if:

¹⁷¹ Australian Bureau of Statistics, *6302.0 – Average Weekly Earnings, Australia, Aug 2011* (17 November 2011) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/6302.0/>>.

<i>Value of settlement</i>	\geq	<i>Expected value of proceeding to hearing</i>
$= \$ \text{ offered by employer}$	\geq	$P_{win} \times (P_{reinst} \times V_{reinst} + P_{comp} \times V_{comp}) - C_{ap}$
$= \$ \text{ offered by employer}$	\geq	$0.31 \times (0.01 \times \$206,325.60 + \$9,049.19)$
$= \$ \text{ offered by employer}$	\geq	$0.31 \times (\$2,063.30 + \$9,049.19)$
$= \$ \text{ offered by employer}$	\geq	$\$3,444.87$

What this illustrates is that an average self-represented applicant who is risk neutral and behaving rationally should not proceed to hearing if they are offered more than approximately \$3,500 by their former employer to settle their claim.

On the face of it, it is hard to imagine that an employer faced with an unfair dismissal claim that has any reasonable prospects of success would not offer at least \$3,500 to the dismissed employee to discontinue the claim, if only to avoid the time and cost involved in going to hearing. Nonetheless, it is worthwhile to explore the data if only to confirm this intuition. If the data ultimately supports that being the case, it suggests that the average self-represented applicant who proceeded to hearing during the period under study did not act rationally.

Before considering that issue, however, it is convenient to anticipate a possible objection to the analysis above – that is, my estimate that the average employee should value reinstatement at no more than three years' salary is too low. Even if that is the case, even if my estimate dramatically understates the value of reinstatement, it does not significantly affect the outcome of the analysis. To illustrate this by an extreme example, I suggest that there are few employees

(myself included) who would not be willing to leave their current employment and face having to find alternative employment in exchange for a payment of one million dollars. That is, there are surely few among us who would not prefer to have one million dollars in their hand over the opportunity to continue working in their current job. On that extreme basis, if one million dollars is the value attributed to reinstatement (that is, we substitute one million dollars for V_{reinst} in the formula) the result is as follows:

<i>Value of settlement</i>	\geq	<i>Expected value of proceeding to hearing</i>
<i>= \$ offered by employer</i>	\geq	$P_{win} \times (P_{reinst} \times V_{reinst} + P_{comp} \times V_{comp}) - C_{ap}$
<i>= \$ offered by employer</i>	\geq	$0.31 \times (0.01 \times \$1,000,000 + \$9,049.19)$
<i>= \$ offered by employer</i>	\geq	$0.31 \times (\$10,000 + \$9,049.19)$
<i>= \$ offered by employer</i>	\geq	$\$5,905.25$

As can be seen, the value attributed to V_{reinst} has very little impact on the overall outcome because of the very low probability that the average self-represented employee will receive reinstatement as a remedy. Yet, based on the data, the very low probability of reinstatement being awarded is entirely realistic. Again, it seems intuitively likely that employers would be willing to offer more than \$5,905.25 to avoid having to defend an unfair dismissal claim that has some prospects of success even if this extreme valuation of reinstatement is correct. The data can assist in confirming that intuition.

4.2 The decision to settle from the perspective of the employer

Again, we will adopt the traditional assumptions in economics that the average employer faced with an unfair dismissal claim is a risk neutral rational actor who seeks to minimise the cost of resolving the claim. Accordingly, the average employer will be willing to settle an unfair dismissal claim if:

$$\text{Cost of settlement} \leq \text{Expected cost of proceeding to hearing}$$

There is one caveat to this. An employer may well have a rational basis for refusing to offer any settlement if the claim has no reasonable prospects of success, even if the cost of settling the unmeritorious claim would be less than the cost of proceeding to (and presumably succeeding at) hearing. This is for two reasons: (i) the employer would not want to create a precedent of settling unmeritorious claims due to the risk that this will encourage others to bring unmeritorious claims in the future;¹⁷² and (ii) the employer may be able to recover costs from the dismissed employee under the Fair Work Act if the dismissed employee should have known the claim had no reasonable prospects of success.

However, assuming that the average unfair dismissal claim has some meaningful prospect of success, the employer's decision model about whether or not to settle the claim can be converted into a formula that can be populated based on the data from the study. Doing so, the average employer would be willing to settle an unfair dismissal claim if:

¹⁷² In other words, refusing to settle in such circumstances is economically rational over the longer term.

<i>Cost of settlement</i>	\leq	<i>Expected cost of proceeding to hearing</i>
$= \$ \text{ offered by employer}$	\leq	$P_{win} \times (P_{reinst} \times C_{reinst} + P_{comp} \times V_{comp}) + C_{emp}$

(a) *Determining the values of each variable in the model*

The variables are all the same as they were in relation to the employee's decision model with the exception of:

- C_{reinst} – which represents the cost to the employer of reinstating the employee (which is something different from the value the dismissed employee may place on being reinstated); and
- C_{emp} – which represents the cost to the employer of defending the claim at hearing.

Substituting the values ascertained above, the average employer will faced with an unfair dismissal claim from a self-represented applicant will be willing to settle if:

<i>Cost of settlement</i>	\leq	<i>Expected cost of proceeding to hearing</i>
$= \$ \text{ offered by employer}$	\leq	$P_{win} \times (P_{reinst} \times C_{reinst} + P_{comp} \times V_{comp}) + C_{emp}$
$= \$ \text{ offered by employer}$	\leq	$0.31 \times (0.01 \times C_{reinst} + 0.99 \times \$9,140.60) + C_{emp}$

The cost to the employer of reinstating the dismissed employee is difficult to estimate and may depend on the reasons for dismissal. If the employee was dismissed on the basis of performance issues, the cost to the employer of

reinstating the employer may be some degree of lost productivity. If the reason for dismissal was misconduct, such as a breach of safety requirements, the cost to the employer may be the increased risk of legal liability. If the dismissal was entirely arbitrary, the cost to the employer may be zero. In addition to these economic costs directly related to the capacity or conduct of the reinstated employee, the employer may also face costs as a result of their decision-making being undermined by the reinstatement decision itself. For example, if an employee who has engaged in shirking is reinstated by Fair Work Australia then other employees may be more inclined to engage in shirking out of a belief that they are less likely to be punished for this behaviour. Alternatively, if the dismissed employee was lowering the morale of the entire workplace through their attitude or behaviour, the productivity of all of the employees may be negatively affected by the dismissed employee's reinstatement. The amount of all of these costs is also likely to depend significantly on the length of time the reinstated employee remains an employee.

Despite this array of uncertainty which makes an precise estimation of the costs of reinstatement difficult, three things are clear. First, the data indicates that the employer is likely to be required to pay back pay, the average amount of which was \$12,514.79. Second, the cost of reinstatement to an employer will in most cases be significantly less than the value of reinstatement to the dismissed employee. Third, for the purposes of determining the amount of the settlement offer that an average employer would make when faced with an unfair dismissal claim from a self-represented applicant, the cost attributed to reinstatement is relatively inconsequential because of the low probability that it will be ordered as a remedy at

hearing. On this basis, and consistent with the approach adopted in the rest of this thesis, a very conservative estimate of \$25,000, plus the average back pay amount of \$12,514.79, will be attributed to C_{reinst} . The total C_{reinst} is then \$37,514.79.

A more scientific method can be applied to determining the value to attribute to C_{emp} – the cost to the employer of defending the claim at hearing. Table 13 above shows that when faced with self-represented employees, employers were represented at hearing in 67 out of 154 cases or approximately 44 per cent of the time. The data also reveals that in cases involving self-represented applicants, the average hearing lasted 1.31 days.¹⁷³ A 2011 survey of 500 Australian lawyers found that the average charge out rate for lawyers with seven years' experience was \$375 per hour.¹⁷⁴ In the context of lawyers acting for corporate and public sector employers in unfair dismissal hearings, the average charge out rate is likely to be higher.¹⁷⁵

Applying the usual rule of thumb that a lawyer will spend at least twice as long preparing for a hearing as actually participating in it, we can estimate the direct cost to a represented employer of proceeding to hearing as follows – 3.93 days multiplied by 6.5 hours per day multiplied by \$375 per hour. This resolves to \$9,579.38. If we multiply this value by 0.44 to represent the likelihood that the

¹⁷³ For the reasons explained earlier in this chapter, this may overstate the true length of hearings to a small degree. See the discussion at chapter 3.2(b) of this thesis above.

¹⁷⁴ See Chris Merritt, 'Westgarth defends hourly billing', *The Australian* (Melbourne) 4 February 2011, 33.

¹⁷⁵ See Doyle's *Guide to the Australian Legal Profession – 2011 Annual Guide* (2011) <<http://www.doylesguide.com/employmentlawyers.html>> ("Employment law Partners within top-tier firms in larger markets typically charge between \$550-\$700 per hour").

average employer will choose to be represented at hearing, this results in C_{emp} being \$4,214.93.

This is almost certainly a significant underestimate of the costs to the average employer of proceeding to hearing for two main reasons. First, and most importantly, it attributes no value whatsoever to the lost productivity cost of having employees diverted from their ordinary work to prepare and participate in an unfair dismissal hearing by collecting relevant documents, instructing any lawyers, appearing at the hearing as a witness, or appearing at the hearing as an advocate. Second, the average hourly rate of a lawyer and the time spent by a lawyer in preparing for hearing (reading documents, proofing witnesses, drafting witness statements and submissions and so on) are likely to exceed the amounts relied on above.

Despite this, and in keeping with the conservative approach adopted to attempt to test the hypothesis that self-represented employees may be irrationally refusing to settle their claims, C_{emp} will be substituted into the formula on the basis that it is \$4,214.93. As such, the average employer facing an unfair dismissal claim from a self-represented employee will elect to settle if:

<i>Cost of settlement</i>	\leq	<i>Expected cost of proceeding to hearing</i>
$= \$ \text{ offered by employer}$	\leq	$P_{win} \times (P_{reinst} \times C_{reinst} + P_{comp} \times V_{comp}) + C_{emp}$
$= \$ \text{ offered by employer}$	\leq	$0.31 \times (0.01 \times \$37,514.79 + 0.99 \times \$9,140.60) +$ $\$4,214.93$

= \$ offered by employer	≤	$0.31 \times (\$375.15 + \$9,049.19) + \$4,214.93$
= \$ offered by employer	≤	$\$2,921.55 + \$4,214.93$
= \$ offered by employer	≤	$\$7,136.48$

4.3 The settlement decision – bringing the two halves of the analysis together

It is now possible to compare the amount of money the average self-represented applicant would be willing to accept, if acting rationally, to settle their claim against the amount of money the average self-represented employer would be willing to pay, if acting rationally, to settle the claim. Recalling the conclusions reached above:

- the average self-represented employee should elect to settle the claim if they are offered a settlement amount that is greater or equal to \$3,444.87 (or \$5,905.25 if reinstatement is valued at one million dollars) ; and
- the average employer should elect to settle the claim if they can do so by offering a settlement amount less than or equal to \$7,136.48.

In other words, it appears to be in the interests of both parties to settle the average claim by a self-represented applicant that proceeded to hearing during the period under study. Indeed, based on the decision models above, this will always be the case so long as the cost to the employer of defending the hearing exceeds the amount by which expected value of reinstatement to the employee exceeds the

expected cost of reinstatement to the employer.¹⁷⁶ Given the extremely low probability that reinstatement will be awarded as a remedy to self-represented employees, this will almost invariably be the case.

This suggests that the original hypothesis stated above is correct: self-represented applicants appear to be irrationally rejecting settlement offers and proceeding to hearing despite the likelihood of receiving a worse outcome at hearing.

4.4 Explanations for the behaviour of self-represented litigants

There are two potential explanations for this. First, the assumptions of economic rationality that inform the analysis may be wrong. For example, the employer may have such ill will towards a dismissed employee that they would rather spend thousands of dollars on lawyers in defending a claim at hearing than pay a cent to the dismissed employee to settle the claim. However, given that employers are almost exclusively corporations (and, as such, are required to maximise shareholder value) or public sector entities (accountable for the proper use of public funds) this explanation seems relatively unlikely to apply to employers in the majority of cases.

On the other hand, this explanation may be more plausible in respect of applicants. That is, it seems more likely that some dismissed employees may be

¹⁷⁶ This is so regardless of the probability of the dismissed employee winning the claim, the relative probability of reinstatement or compensation being awarded and the expected value of any compensation that is awarded. This is because these factors feed into both the dismissed employee's decision-making process and the employer's decision-making process in exactly the same way such that they offset one another.

less concerned about the economic outcome of the claim and more concerned with principle – for example, having the perceived unfairness of their dismissal publicly vindicated or simply having the opportunity to be heard by an independent third party. For these applicants, proceeding to a hearing, even if it is likely to result in a worse economic outcome, may be seen as preferable to settling the claim. While this may be the case occasionally, in my experience representing employers in unfair dismissal proceedings, dismissed employees are usually deeply concerned about remedying the economic effect of their dismissal and few are intent on proceeding to hearing, come what may, solely on the basis of principle.

The second, and arguably more likely explanation for self-represented applicants rejecting objectively “good” settlement offers, is that they are simply overestimating their likelihood of winning at hearing and the value of the remedy that they will be awarded if they do win. That is, self-represented applicants are making what they believe is an economically rational decision by proceeding to hearing but they are doing so on the basis of incorrect information which means that their decision is, objectively, irrational. This explanation seems particularly credible when the discrepancy between the emphasis that is placed on reinstatement as a remedy in the legislation and the rarity with which it is awarded in practice is considered.

As discussed in chapter 2 of this thesis, the Fair Work Act provides:

381 Object of this part

- (1) The object of this part is:...
- (c) to provide remedies if a dismissal is found to be unfair, **with an emphasis on reinstatement.**

...

390 When FWA may order remedy for unfair dismissal

...

(3) FWA must not order the payment of compensation to the person unless:

(a) FWA is satisfied that reinstatement of the person is inappropriate...¹⁷⁷

It seems fair to conclude that a reasonable person reading the plain words of the legislation would expect that, if a person was successful in establishing that their dismissal was unfair, there is a very good chance that reinstatement will be awarded as the remedy. However, the findings of the empirical analysis discussed in this thesis establish that this expectation could hardly be further from the truth and that, for self-represented applicants, the likelihood of being reinstated is, in fact, almost negligible.

While it may be expected that many self-represented applicants are unlikely to read the legislation itself, the same message about the primacy of reinstatement pervades the self-help guidance documents issued by Fair Work Australia in respect of unfair dismissal. The official *Unfair Dismissal Guide* provides:

What are the remedies for unfair dismissal?

If Fair Work Australia is satisfied an employee was unfairly dismissed then it may order the employee's reinstatement together with continuity of service and lost remuneration, or the payment of compensation to the employee if satisfied that reinstatement is inappropriate.¹⁷⁸

¹⁷⁷

Fair Work Act 2009 (Cth) ss 381, 390 (emphasis added).

The Fair Work Australia website, along the same lines, states:

Remedies for unfair dismissal

If Fair Work Australia is satisfied an employee was unfairly dismissed then it may order the employee's reinstatement, or the payment of compensation to the employee if satisfied that reinstatement is inappropriate.

A survey published in November 2010 into the conduct of conciliations by Fair Work Australia – a process that takes place to attempt to settle an unfair dismissal claim before it is listed for hearing – sought to identify, among other things, the sources of information about unfair dismissal that parties rely on. The survey revealed that the above sources are precisely the sources of information that applicants rely on to learn about unfair dismissal. The survey described that 7 per cent of applicants – that is, applicants themselves as distinct from any representatives (who were surveyed separately) – reviewed the legislation directly, 46 per cent read the *Unfair Dismissal Guide*, and 83 per cent accessed the Fair Work Australia website to obtain information.¹⁷⁹

Even the most diligent self-represented applicant who goes to the length of perusing unfair dismissal cases (an information source not included within the survey) will find the same message about the primacy of reinstatement repeated over and over. The following three examples from decisions in the period illustrate the point:

¹⁷⁸ Commonwealth of Australia, *Fair Work Australia Guide – Unfair Dismissal* (2011) 4 <http://www.fwa.gov.au/documents/factsheets/guide_dismissal.pdf>.

¹⁷⁹ TNS Social Research, *Fair Work Australia Unfair Dismissal Conciliation Research - Survey Results* (November 2010), 18-19 <<http://www.fwa.gov.au/documents/dismissals/report.pdf>>.

Section 381(c) of the Act makes plain, where an applicant demonstrates that he/she was unfairly dismissed, that **reinstatement is the primary remedy**.

- *Diane Hammond v Australian Red Cross Blood Service - Sydney* [2011] FWA 1346, [87] (Sams DP).

Section 390(1) provides that where the Tribunal finds that a dismissal was unfair, **reinstatement is the primary remedy with compensation as an alternative**.

- *Mr Mark Farley v Toll Transport Pty Ltd T/A Toll Liquid Distribution* [2011] FWA 1683, [116] (Stanton C).

The language of s.390(3), although expressed in the negative, establishes that **the primary remedy for an unfair dismissal is reinstatement**.

- *Heath Graham Lebsanft v Oakey Abattoir Pty Ltd* [2011] FWA 3717, [253] (Ryan C).

(emphases added)

Given that reinstatement is likely to be valued highly by applicants, the effect of relying on these statements and overestimating the probability of reinstatement being awarded, even by a small amount, has a dramatic impact on the settlement amount that an applicant seeking to maximise their expected outcome from the claim would accept. For example, if a self-represented applicant considers that there is a 25 per cent chance that they will be awarded reinstatement if they succeed at hearing (and I would suggest a typical applicant reading these information sources might believe the likelihood would be far greater than that), applying the economic decision-making model outlined above, the applicant would refuse to accept a settlement offer below \$18,795.48. This is an amount well above that which an employer would be willing to offer whose view of the probability of reinstatement being ordered was closer to reality.

If this explanation is correct, the effect is that the average self-represented applicant is proceeding to hearing when: (i) it is against their interests to do so; and (ii) they would not do so if they were aware of the true position. This is in no one's interest, except for perhaps the employer's lawyers. It results in worse outcomes for the applicant (in the form of a worse economic outcome than settlement), it results in worse outcomes for the employer (in the form of the unrecoverable costs incurred in defending claims at hearing), and it results in worse outcomes for the community (in the form of the additional expense in funding Fair Work Australia – its premises, staff, Members, and facilities – to hear and resolve these claims).

The implications of this, along with the other findings from the study detailed above in chapter 3, for the remedy regime for unfair dismissal will be considered further in chapter 6 of this thesis. First, however, it is necessary to turn from the practical operation of the remedy regime discussed in the last two chapters to its theoretical merits. This will be the subject of the next chapter.

5.0 AUSTRALIAN UNFAIR DISMISSAL LAWS IN THEORY – EVALUATING THE THEORETICAL UNDERPINNINGS OF THE CURRENT REMEDY REGIME

5.1 Introduction and overview

Having examined how the current remedy regime for unfair dismissal in Australia is operating in practice in the preceding two chapters, it is appropriate to now turn to consider the theoretical underpinnings of that regime.

In order to do so, section 5.2 will first identify the statutory purposes that are intended to be served by providing a remedy to a person who has been unfairly dismissed from their employment. This analysis will show that the remedy regime in Australia is intended to focus on: (i) making whole the loss suffered by a person who has been unfairly dismissed; and (ii) providing a “fair go all round” to both the employer and the dismissed employee.

Sections 5.3 and 5.4 will then address the extent to which the two possible remedies for unfair dismissal – compensation and reinstatement – are capable of satisfying these purposes. It will be argued that, for different reasons, neither remedy is capable of entirely satisfying both purposes and thus neither remedy is entirely satisfactory from a theoretical perspective.

Section 5.3 will address the remedy of compensation. It will be argued that while compensation is a remedy that provides both parties with a “fair go” (in the sense that it is a remedy that both parties can obtain in equivalent circumstances

and one that does not unjustly enrich either party), it is one that may not entirely make whole the losses suffered by a person who has been unfairly dismissed, because of the intangible benefits that a person may derive from being employed that cannot be made good by money alone.

Section 5.4 will address the remedy of reinstatement. It will be argued that while reinstatement has the potential to fully make whole the loss suffered by the unfairly dismissed employee (by unwinding the unfair dismissal itself), it is a remedy which, in the context of Australian employment laws as a whole, does not provide employers with a “fair go”. This is because the availability of such a remedy results in, effectively, an employment relationship that may be specifically enforced by the employee if the employer acts unfairly to terminate it, but one that may not be specifically enforced by the employer if the employee acts unfairly to terminate it. It will be shown that the typical justification that is raised for this inconsistency, that the employer and employee are in fundamentally different positions with respect to the impact of the cessation of an employment relationship, ultimately rings hollow when subjected to careful scrutiny.

It will also be argued in section 5.4 that reinstatement is inherently unsatisfactory from a theoretical perspective. This is because of the interference with fundamental notions of freedom and personal autonomy that it necessarily entails through its capacity to deny employers the right to control whom they maintain in their employment.

The implications of this theoretical analysis, coupled with those from the practical analysis undertaken earlier in this thesis, will then be considered in chapter 6 in evaluating the remedy regime as a whole.

5.2 The purpose of providing remedies for unfair dismissal

Neither the Fair Work Act itself nor the explanatory memoranda that accompanied its bill is explicit in stating the purpose of providing unfairly dismissed employees with access to remedies. A number of purposes are possible – punishing the employer, deterring future unfair dismissals, compensating unfairly dismissed employees, and so on. The objects provision of the Part of the Fair Work Act that deals with unfair dismissal only provides as follows:

381 Object of this Part

(1) The object of this Part is:

...

(c) **to provide remedies if a dismissal is found to be unfair**, with an emphasis on reinstatement.

(2) The procedures and **remedies** referred to in paragraphs (1)(b) and (c), and the manner of deciding on and working out such remedies, **are intended to ensure that a “fair go all round” is accorded to both the employer and employee concerned.**¹⁸⁰

While this indicates that a key purpose of the remedy regime is ensuring fairness as between employers and employees in respect of the remedies offered,

¹⁸⁰ *Fair Work Act 2009* (Cth) s 381 (emphasis added).

the provision does not provide any further explication of Parliament's substantive purpose in providing employees with a right to seek remedy for unfair dismissals. However, that purpose can be discerned from the manner in which Parliament has chosen to regulate unfair dismissal under the Fair Work Act.

In this regard, it is crucial to begin by recognising that Parliament chose not to prohibit unfair dismissals under the Fair Work Act. That is, there is no provision in the Act that states 'an employer must not unfairly dismiss an employee'. As a consequence, there is no contravention of the Act if an employer does so. Instead, all that may be said is that employers may have an incentive not to dismiss employees unfairly because if they do so they may be required to provide the employee with a remedy which they would not have to provide if the dismissal was fair. In some ways, then, the situation in relation to unfair dismissal in Australia echoes that described in the famous statement by Oliver Wendell Holmes Jr in relation to breach of contract:

The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it — and nothing else.¹⁸¹

In other words, a contractual obligation to do something is really an obligation either to do the thing or to pay damages instead.¹⁸² In the same fashion, the remedy regime for unfair dismissal in Australia really operates as an obligation on employers to dismiss employees fairly or provide them with a remedy if they do not do so. This

¹⁸¹ Oliver Wendell Holmes Jr, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457, 462.

¹⁸² For an interesting article criticising this traditional reading of this quote as suggesting that failing to perform a contract is not a legal wrong but simply a choice that is open to the contractor, see Joseph M Perillo, 'Misreading Oliver Wendell Holmes on Efficient Breach and Tortious Interference' (2000) 68(4) *Fordham Law Review* 1085.

conclusion is supported by the fact that there is nothing overtly punitive in the remedies that may be ordered – reinstatement literally puts the parties back in the position they were in prior to the unfair dismissal and an order of monetary compensation is intended to have the equivalent effect.¹⁸³

This approach to regulating unfair dismissal is in sharp contrast to the manner in which Parliament has chosen to regulate other forms of undesirable conduct under the Fair Work Act. For example, in relation to discrimination by an employer against an employee on the grounds of the employee's involvement with a union, Parliament has elected to expressly prohibit that conduct under the Fair Work Act and to provide that breach of the prohibition may result in the employer being prosecuted by a government agency and facing court ordered pecuniary penalties.¹⁸⁴ Similarly, an employer is specifically prohibited from coercing an employee to cash out accrued leave benefits and an employer acting in contravention of that prohibition may, again, be subject to prosecution and pecuniary penalty.¹⁸⁵ The fact that Parliament has elected to regulate many forms of employer conduct in this way, but to regulate unfair dismissals by employers in another way, suggests that different purposes must have been intended for each.¹⁸⁶

¹⁸³ See, *Sprigg v Paul's Licensed Festival Supermarket* (1998) 88 IRJ 21, 26, 28-30.

¹⁸⁴ See, *Fair Work Act 2009* (Cth) ss 346 ("A person must not take adverse action against another person because the other person... is... an officer or member of an industrial association..."), 539 (which deals with the imposition of penalties for breach of such provisions).

¹⁸⁵ See, *ibid* ss 341(2)(h), 343, 539.

¹⁸⁶ There may also have been some pragmatic reasons for the differential treatment. Under the separation of powers embodied in the *Australian Constitution*, it is only a court that can determine whether or not a person has contravened a law as this involves the exercise of judicial power (see, eg, *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 91 (Toohey JJ)). Accordingly, if Parliament provided that it was a breach of the Fair Work Act

The intended purposes of an express prohibition and an associated penalty regime are fairly clear on their face. Such a manner of regulation attaches Parliament's moral opprobrium to the prohibited conduct, punishes the wrong-doing employer, and deters future breaches of the prohibition by the particular employer and employers at large. On the other hand, the purpose of the remedy regime for unfair dismissal – which can be pursued only by the dismissed employee themselves and results in compensatory remedies specific to the employee, rather than any punitive sanctions imposed by the state against the employer – can be seen as focused only on requiring the employer to make whole the loss suffered by the dismissed employee as a consequence of the unfair dismissal. That is, by providing unfairly dismissed employees with a personal right to seek a compensatory remedy, there is a recognition by Parliament that it is appropriate that an employer who chooses to dismiss an employee unfairly should be required to provide a remedy to the dismissed employee that alleviates the hardships suffered as a result of the dismissal.

Taken together, the relevant objects provision in the Fair Work Act and the manner in which Parliament has chosen to regulate unfair dismissals in the context of the Act as a whole, strongly indicate that the purposes of the remedy regime are to:

for an employer to unfairly dismiss an employee, of necessity the employee would have had to approach a court to seek a remedy for the breach. As such, Parliament could not have established the relatively cheap, speedy and informal system of unfair dismissal arbitration by a tribunal, Fair Work Australia, as the forum to resolve these claims.

- (a) ensure that employers who unfairly dismiss employees are required to make whole the losses suffered by the dismissed employee as a result of the unfair dismissal; and
- (b) ensure that remedies ordered are fair to both employees and employers alike.

Whether the current remedies of reinstatement and compensation are capable of achieving these purposes is considered in the following two subsections in turn.

5.3 A theoretical analysis of compensation as a remedy for unfair dismissal

- (a) *Is compensation capable of making whole the losses suffered by the unfairly dismissed employee?*

Compensation is certainly designed to attempt to make whole the losses suffered by an unfairly dismissed employee. Section 392 of the Fair Work Act specifically provides that a compensation order is to be “in lieu of reinstatement”.¹⁸⁷ Thus, to the extent possible, it should provide the dismissed employee with the same practical outcome as being reinstated to their former employment – that is, an effective unwinding of the unfair dismissal itself. This is reflected in the approach that Fair Work Australia has taken to calculating the amount of a compensation award to be ordered in a particular case, set out in the seminal decision of the Full Bench in *Sprigg*:

¹⁸⁷ *Fair Work Act 2009* (Cth) s 392.

STEP 1: Estimate the remuneration the employee would have received, or have been likely to have received, if the employer had not terminated the employment [unfairly].

STEP 2: Deduct moneys earned since termination. Workers compensation payments are deducted but not social security payments. The failure of an applicant to mitigate his or her loss may lead to a reduction in the amount of compensation awarded.

STEP 3: The remaining amount of compensation is discounted for contingencies.

STEP 4: The impact of taxation is calculated to ensure that the employee receives the actual amount he or she would have received if they had continued in their employment.

STEP 5: The legislative cap on compensation is applied.¹⁸⁸

Based on this approach, subject to the statutory cap on compensation that Fair Work Australia is required to apply, the employee should receive the precise amount of remuneration which they would have received had the unfair dismissal not occurred.

However, there are two substantial impediments to this remedy of compensation being capable of making whole the loss suffered by the unfairly dismissed employee in the majority of cases. These will be addressed in turn.

First, and most obviously, the cap on compensation may mean that a dismissed employee's losses are not fully made whole. For example, if, but for the unfair dismissal, the employee would have continued to be employed for a period of more than six months by the employer and the dismissed employee cannot find alternative work during that time, the compensation ordered will not fully restore the

¹⁸⁸ *Sprigg v Paul's Licensed Festival Supermarket* (1998) 88 IRJ 21, 29.

financial losses that the dismissed employee has suffered because of the cap.¹⁸⁹

However, this is more of a practical issue in the particular implementation of compensation as a remedy that has been adopted in Australia, rather than anything inimical to it operating as an effective remedy in principle.

Second, and more significantly, monetary compensation by its nature is incapable of compensating a dismissed employee for any intangible benefits which they might have derived from their former employment that they will no longer enjoy. A useful way to illustrate this point is through an examination of the circumstances of the case of *Mark Summers v Snack Brands Australia Pty Ltd*¹⁹⁰ that was decided during the period under study. Snack Brands Australia is a business focused on the preparation, production and packaging various varieties of potato and corn chips that are popular in the Australian market. Mr Summers worked in the corn processing unit at Snack Brands Australia's factory in Smithfield, New South Wales. On the face of it, one might reasonably imagine that Mr Summers' job in the corn processing unit (a unit essential to the production of 'Cheezels', 'Chickadees', and other corn-based snacks popular in Australia) did not entail too many intangible benefits beyond the pay cheque that he took home every fortnight. However, Commissioner Roberts overcame any preconceptions he might have had to that effect and in his judgment in the case identified the following:

¹⁸⁹ The data analysed in chapter 3 of this thesis indicates that 13 applicants were awarded compensation discounted down to the statutory cap. This suggests that each of these employees' financial losses were not made whole by the compensation order.

¹⁹⁰ [2011] FWA 960.

In cross-examination, Mr Summers described himself as 'passionate about my job' and spoke of his 'love for making chips'. As life ambitions go, this may seem to be a modest one but it is of vital importance to Mr Summers and should be given appropriate weight.¹⁹¹

In the event, Commissioner Roberts concluded that Mr Summers had been unfairly dismissed and that the appropriate remedy, taking into account the intangible benefits Mr Summers' derived from his job, was reinstatement. Compensation, it can be appreciated, would not have been an adequate remedy for Mr Summers. Money alone could not have fully made up for Mr Summers being denied his life's passion.

Although not all employees are likely to be as passionate about their jobs as Mr Summers, some might. And others, perhaps a larger group, will derive other, more basic, intangible benefits from being employed, earning money, and feeling like they are centrally involved in contributing to the success of their own lives and those of their family members.¹⁹² For such employees who are dismissed unfairly and who have difficulty obtaining alternative employment, a monetary award is incapable of replacing those intangible benefits.

As such, it must be accepted that a remedy of monetary compensation may not always be capable of entirely making whole the losses suffered by an unfairly dismissed employee. Accordingly, in some circumstances, compensation as a

¹⁹¹ Ibid [109].

¹⁹² For a detailed discussion which summarises a wide body of medical literature on the psychological effects of termination of employment and subsequent unemployment, see Darity Jr and Goldsmith, above n 95, 122-30.

remedy may fail to live up to one of the two key intended purposes of the remedy regime for unfair dismissal.

(b) *Is compensation a remedy that is fair to both employers and employees alike?*

Fairness is a concept that can be difficult to clearly define.¹⁹³ However, a tell-tale sign that unfairness is present arises where like circumstances are treated in other than a like manner without any reasonable justification being apparent for this difference in treatment.

On that basis, compensation as a remedy for unfair dismissal is unlikely to be regarded as unfair. While it is true that under the Fair Work Act there is no right for an employer to obtain compensation as a remedy for an “unfair resignation” of an employee¹⁹⁴ in the same way that an employee can obtain compensation for an unfair dismissal, employers can effectively secure the same remedy through the common law. Specifically, if an employer wishes to do so, they can engage employees on the basis that the employee may only resign on the giving of a particular period of notice or on particular grounds, or make the employee’s future employment subject to a reasonable restraint of trade. Then, if the employee resigns other than in accordance with those terms, the employer is able to obtain compensation from the employee for the losses suffered by the employer due to resignation via an action for breach of contract. While the effectiveness of such

¹⁹³ Perhaps, like obscenity, it is easier simply to recognise unfairness when you see it: *Jacobellis v Ohio*, 378 US 184, 197 (Stewart J) (1964).

¹⁹⁴ That is, a resignation for reasons that would be regarded as unfair if they were reasons for which an employer terminated an employee’s employment. See section 5.4(b) below.

contractual terms may have some practical limits (for example, proving that an employee resigned for a prohibited reason rather than for a permissible reason), these are no different from the practical limits on an employee seeking compensation for an unfair dismissal (for example, proving that the dismissal was for an invalid reason rather than a valid one). In each case, the wronged party (whether the unfairly dismissed employee or the employer who is the victim of a resignation in breach of contract) can be compensated for the losses they have suffered as a result of the wrong.

Although levelling the playing field in this way requires the employer to engage employees only on particular terms which will result in a breach of contract for an unfair resignation, as a practical matter, the employer usually controls the terms of a contract of employment and relatively junior employees (those that are likely to be protected by the unfair dismissal provisions of the Fair Work Act in the first place) usually have little bargaining power to alter the terms. Given that it is open to the employer to protect themselves in this way from unfair resignations, compensation as a remedy for unfair dismissal cannot be viewed as denying a “fair go all round” to employers.

The remedy of compensation for unfair dismissal is also fair in the sense that it compensates the employee only, but wholly, for the actual pecuniary losses they have suffered as a result of the unfair dismissal. It does not, at least in theory, unjustly enrich either party.¹⁹⁵ Accordingly, compensation as a remedy can

¹⁹⁵

Of course, in practice, determining the various elements of compensation (for example, how long an employee would have remained employed absent the unfair dismissal) is often

reasonably be viewed as one that is capable of being fair to both employees and employers alike.

5.4 A theoretical analysis of reinstatement as a remedy for unfair dismissal

- (a) *Is reinstatement capable of making whole the losses suffered by the unfairly dismissed employee?*

Reinstatement is arguably the most obvious and effective remedy if what is sought is to undo the consequences of an unfair dismissal. The effect of an order of reinstatement is, generally, to put the parties back in precisely the positions that they were in prior to the dismissal occurring.¹⁹⁶ This will be effective in entirely reversing the negative effects of the unfair dismissal on the employee, both tangible and intangible, so long as:

- (a) the employer is required to pay the dismissed employee back pay in respect of the period between the date of dismissal and the date of the reinstatement; and
- (b) the employer recognises continuity of service of the employee.

speculative which may mean that in particular cases an employee may end up with more or less compensation than they deserve. This practical difficulty of compensation as a remedy will be addressed in more detail in chapter 6.

¹⁹⁶

In addition to reinstating the dismissed employee to the position which they held prior to the unfair dismissal, Fair Work Australia is also empowered to under section 391(1)(b) of the Fair Work Act to order that reinstatement take effect by the employer “appointing the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal”.

Each of these ancillary orders can be made by Fair Work Australia under the Fair Work Act in respect of an order of reinstatement.¹⁹⁷ Accordingly, it seems clear that the remedy of reinstatement is capable of satisfying the first purpose of the remedy regime – it can be effective in successfully making whole the losses suffered by the unfairly dismissed employee.

(b) Is reinstatement a remedy that is fair to both employers and employees alike?

In order to assess the fairness or otherwise of the availability of the remedy of reinstatement for unfair dismissal it is useful to consider two hypothetical scenarios with respect to the cessation of employment.

The first scenario

Consider an employee who decides to resign from their employment in accordance with whatever notice period is specified in their contract of employment. Imagine that the employee has some special skills and that it will be difficult for the employer to quickly replace the employee or perhaps imagine that the employee was a particular draw card for the employer's customers who now will take their business elsewhere. Accordingly, the employer will be disappointed to lose the employee and will no doubt suffer a loss, perhaps a significant loss, in ongoing production or sales as a result of the resignation. If the employee is difficult to replace, perhaps these losses might endure for a long period. If the employer is a small business operator, the effects might be particularly acute. Perhaps the resignation will mean that the employer has to work longer hours themselves until a

¹⁹⁷ See *Fair Work Act 2009* (Cth) ss 391(2), (3).

replacement for the resigning employee can be recruited. Or, in an extreme case, perhaps the resignation of a key employee might be the tipping point that leads to the employer's business becoming unsustainable and insolvent, putting the employer and any other employees out of work entirely.

Despite the hardships that will be endured by the employer, in this scenario the employee (by definition) has committed no breach of contract and, as such, the employer is left without recourse to any possible remedy to alleviate the effects of the resignation.

The second scenario

Now consider an employer who dismisses an employee in accordance with whatever notice period is contained in the employee's contract of employment. As a result of this dismissal, the employee will need to seek alternative work and may go for some period of time before a suitable alternative can be found. This is obviously concerning to the dismissed employee and, in all likelihood, will result in at least a temporary loss of income. If finding suitable work is challenging, perhaps the employee may have to spend a long time looking for alternative employment or accept a job that pays less or is less satisfying or both. In a worst case scenario, perhaps the employee may need to consider working in another location or in a different field, perhaps resulting in, at best, a longer commute or, at worst, a need to move or even retrain. Perhaps this might involve uprooting the employee's family and significant upheaval in the employee's life.

In this scenario, really the flipside of the first scenario posed, as the employer (by definition) has committed no breach of contract it would make sense, from the perspective of consistency, if the employee were left without recourse to any possible remedy to alleviate the effects of the dismissal. However, this may not be the case – depending on the reasons for the dismissal or the process leading up to it, the employee may well be able to seek reinstatement under the Fair Work Act on the basis that their dismissal was unfair.

For example, suppose the employer dismissed the employee because of a suspicion that the employee had emailed pornographic images around the workplace¹⁹⁸ when the employee had not, in fact, done so. Or, suppose the employer dismissed the employee because the employee was a woman. In either example, the employee's dismissal would be regarded as unfair, the employee could bring a claim under the Fair Work Act, and Fair Work Australia would be empowered to order reinstatement.

But what if the very same reasons motivated the resignation? That is, what if the employee resigned because she suspected that her employer was emailing inappropriate images around the workplace but, in fact, the employer had done no such thing. Or what if the employee resigned because her new supervisor was a woman and the employee could not stand to work for a female boss. In both examples, the decision to resign is unfair on the employer in exactly the same way that the decision to dismiss was unfair on the employee. Yet the employer is left

¹⁹⁸ This actually occurred in one of the cases that formed part of the empirical study: *Mr Geoffrey Thomas Spargo v QR Network Pty Ltd* [2010] FWA 7822.

with no possibility of forcing the employee who has unfairly resigned back to work¹⁹⁹ but the employee can obtain a remedy to force the employer to reinstate the employment.

On the face of it, this appears to be a clear example of like circumstances being treated in something other than a like manner. As such, absent any reasonable justification for this difference in treatment, the availability of the remedy of reinstatement to the employee alone would appear to be unfair on the employer. Or, to adopt the Australian vernacular that Parliament thought appropriate to incorporate into the Fair Work Act, the availability of the remedy to the dismissed employee without any equivalent remedy being available to the employer would appear to deny the employer “a fair go all round”.

Justifying apparent unfairness

The need to justify this apparent unfairness has not been lost on commentators agitating in favour of reinstatement as a remedy for unfair dismissal. The difference between the treatment of employees and employers in this regard has been justified largely on the basis that: (i) reinstatement is the only remedy that can make whole the employee’s loss (so employees should have it);²⁰⁰ and (ii) unfair dismissal has a dramatically more significant impact on an employee than an unfair resignation has on an employer (so employers do not need an equivalent

¹⁹⁹ Even if the resignation was in breach of contract, equity will decline to order specific performance of a contract for personal services. This is discussed further below.

²⁰⁰ See, eg, Summers, above n 15, 531: “Reinstatement, as well as back pay and damages, should be available, for it is often the only adequate remedy”.

remedy).²⁰¹ The following statement made by Professor Blades (and the associated footnote) from his influential article from 1967 is a typical example, both as to the substance of the latter justification and the self-evident nature that its supporters appear to believe it has in its favour:

In short, the employee's right to work for whom he chooses is too valuable to be circumscribed or limited to prevent abuse of the almost negligible coercive power of an employee's threat to quit his job. The situation of the employer differs drastically from that of the employee.¹⁰⁸ There is nothing more than the appeal of symmetry and a harkening back to hollow notions of mutuality to uphold any suggestion that the rights of employers must correspond to the rights of employees.

...

¹⁰⁸ ["]As a matter of practical common sense, the situations of the employer... and that of one of its servants are very different. The loss or damage to the [employer] occasioned by the departure of one of its servants would, save in very exceptional circumstances, be negligible. To a servant... the security of employment... is of immense value.["]

McClelland v. N. I. Gen. Health Services Bd., [1957] 1 W.L.R 594, 612.²⁰²

In summary, then, proponents of differential treatment for employees and employers in respect of cessation of employment argue that:

²⁰¹ Professor Blades summarised the justification with enviable brevity in 'Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power' (1967) 67 *Columbia Law Review* 1404, 1425: "The answer to this argument is that an equation of the rights of the employer with the rights of the employee is inconsistent with the basic inequality in the position of the two".

²⁰² Ibid 1425-6.

- (a) reinstatement is the only remedy that is capable of making whole the losses suffered by an employee who is unfairly dismissed;
- (b) the right of an employee to choose for whom they work is important;
- (c) the impact of an employee unfairly resigning on an employer is “almost negligible” relative to the impact on an employee of being unfairly dismissed; and
- (d) this negligible impact on the employer is not sufficient to justify interfering with the employee’s right to choose for whom they work (that is, to justify providing employers with a right to seek an equivalent order to reinstatement if an employee unfairly resigns).

While the first two limbs of this justification must be accepted, two serious problems with the justification as a whole remain. First, the justification assumes a conception of employment that does not accord with today’s realities regarding the impact that unfair resignations might have on employers. Second, and more fundamentally, while appropriately recognising the importance of an employee’s right to choose for whom they wish to work, the justification ignores entirely the importance of an employer’s reciprocal right to choose whom they wish to have work for them. Each of these issues will be discussed in turn.

Problem 1: The justification presumes that the loss of an employee will almost always have a negligible effect on the employer

The presumption that the resignation of an employee will have little impact on their employer has some initial appeal due to the way in which we usually conceive of employment. For example, we can probably all accept that the CEO of Costco likely cares very little if a cashier in his Sydney store happens to resign. The CEO might well view the employee as merely a generic input into the production of his business that can be easily replaced with little impact on the business of the employer as a whole and that view might well be accurate.

However, this conception of employment does not reflect reality for many employees and employers in Australia today. In particular, about half of all employees in Australia are employed, not by the gigantic Costco-sized employers of this world, but by small businesses. The most recent statistics published by the Australian Government reveal that small businesses (defined as those having 0 to 19 employees) employ 47.2% of Australian workers.²⁰³

It can readily be inferred that small businesses are far more likely to suffer significant negative effects from an unexpected resignation of one of their employees than may be the case with giant employers. Indeed, if a good employee unfairly resigns, the financial and other consequences for their small business employer may well be significantly worse than the consequences to the good

²⁰³ Australian Government Department of Innovation, Industry Science and Research, *Key Statistics – Australian Small Business* (2011), 6
<<http://www.innovation.gov.au/SmallBusiness/KeyFacts/Documents/SmallBusinessPublication.pdf>>.

employee if they were unfairly dismissed. For example, consider the owner of a small wedding photography business with three employees. Imagine now that one of these employees is an extremely talented photographer whose images are invariably used on the business's website to attract customers and who has developed a reputation as being one of Sydney's best young photographers. If such an employee were unfairly dismissed it seems very likely that the dismissed employee would quickly find a new employer. On the other hand, if the employee were to unfairly resign, this may have a dramatic impact on the ability of the employer to run the business (as he has just lost one-third of his staff) and the business's bottom-line (as he has lost a key draw-card for clients).

Indeed, as a general rule, it seems highly likely that a good employee would likely have an easier time obtaining another job than a small business would have obtaining another equally good employee.

Accordingly, this aspect of the justification – that employers suffer only negligible effects from the resignation of an employee – likely misrepresents the reality of the impact of the unfair resignation of an employee for a significant proportion of employers in Australia. If that is the case, the justification that employers do not need a remedy equivalent to reinstatement because they do not suffer equivalent consequences is unsatisfactory.

Problem 2: The justification ignores the importance of the right of an employer to control whom it maintains as employees

Despite the fact that employers may “deserve” a remedy equivalent to reinstatement on the basis of the argument above, the right of a person to choose for whom they work is fundamental to any modern conception of basic human rights. As such, the suggestion that it is not appropriate to provide employers with a remedy equivalent to reinstatement – a remedy that would force employees who unfairly resign to return to work against their will – is difficult to argue with. Under the law in Australia, it is accepted that employees cannot be compelled by the law to work for someone whom they do not want to work for, regardless of the reason they do not want to work for them. Even if an employee has agreed that they will so work and their refusal to do so constitutes a breach of their contract of employment, a court will not order that contract be specifically performed.²⁰⁴ While sometimes this is referred to as a ‘strong reluctance’ by the courts as opposed to a hard and fast rule,²⁰⁵ the fact is that specific performance of a contract of employment has never been ordered in Australia. It is recognised by the courts that to do otherwise smacks of slavery: a person who does not want to work for someone, being forced to do so

²⁰⁴ For a recent statement to this effect, see *Bircan v Portakaldali* [2008] NSWSC 791, [20] (Austin J): “The aspects of continual supervision and personal service arise from the obligations of the plaintiff rather than the obligations of the defendant, but because the order sought would be tantamount to an order for specific performance (in that it would force the parties to continue with their existing management relationship), the order would be lacking in mutuality. Since the court ought not make an order enforcing the agreement against the plaintiff, nor should it make an order enforcing the agreement against the defendant.”

²⁰⁵ *Turner v The Australasian Coal and Shale Employees’ Federation* (1984) 6 FCR 177, 192-3: “Another feature of contracts of employment which has caused concern in some of the authorities is the suggested rule that specific performance of a contract of employment can never be granted... Such cases are, however, matters of discretion, and not matters of hard and fast rule that specific performance cannot be granted.”

against their will. As such, the employer is, appropriately, left to their remedy in damages to compensate them for the employee's breach of contract.

Although it may not have been so prior to the American Civil War in 1861 (despite Blackstone's persuasive, if technical, argument contained in the *Commentaries* in 1769 that slavery is, of its nature, contrary to the common law),²⁰⁶ today, the correctness of this position that the law has taken is rarely disputed. Compelling a person to work for another person against their will is anathema – it offends our fundamental beliefs enshrined in the *International Covenant on Civil and Political Rights*²⁰⁷ that no one should be held in slavery or servitude,²⁰⁸ that no one should be required to perform forced or compulsory labour,²⁰⁹ and that everyone has the right to liberty.²¹⁰

However, it is striking that those commentators who recognise the importance of these rights to employees, at the same time overlook the importance of employers

²⁰⁶ Sir William Blackstone, *Commentaries on the Laws of England* (Cavendish, first published 1769, 2001 ed) vol 1, 325-6: "I have formerly observed that pure and proper slavery does not, nay cannot, subsist in England... And indeed it is repugnant to reason, and the principles of natural law, that such a state should subsist any where... [I]t is said that slavery may begin "*jure civil*"; when one man sells himself to another. This, if only meant of contracts to serve or work for another, is very just: but when applied to strict slavery, in the sense of the laws of old Rome or modern Barbary, is also impossible. Every sale implies a price, a *quid pro quo*, an equivalent given to the seller in lieu of what is transferred to the buyer: but what equivalent can be given for life, and liberty, both of which (in absolute slavery) are held to be in the master's disposal? His property also, the very price he seems to receive, devolves *ipso facto* to his master, the instant he becomes his slave. In this case therefore the buyer gives nothing, and the seller receives nothing: of what validity then can a sale be, which destroys the very principles upon which all sales are founded?"

²⁰⁷ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

²⁰⁸ Ibid arts 8(1), (2).

²⁰⁹ Ibid art 8(3)(a).

²¹⁰ Ibid art 9(1).

having reciprocal rights.²¹¹ The same anathema to compelling a person to work for someone whom they do not want to should also apply to the exact inverse of this situation – compelling an employer to have work for them an employee who they do not want. There is no relevant distinction between the situations. The same reasons that compel us to regard forced labour as untenable are applicable to forced employment.

It is no answer to say that employers are merely faceless corporations and thus are not entitled to the same freedoms as their employees. First of all, as has been shown, it is simply not the case that all employers are large corporations – almost half of all employees in Australia are employed by small businesses where the employer is almost certainly a real person who has a direct relationship with each employee. Second, and more significantly, ultimately all employers, even the very largest employers, are made up of individuals – supervisors, managers, colleagues and subordinates – and it is these individuals who may be forced to work with someone who they do not wish to via an order of reinstatement. Indeed, as Professor West has noted:

[T]he employment relationship remains a personal one even on the assembly line in the modern corporation... The employee may never meet the 'employer' in the form of the corporate's chief executive officer, but the employee always has a personal relationship, whether good or bad, with the front line supervisor. Often this supervisor is the one who has

²¹¹ Professor Blades, one of the few commentators to even allude to the issue, dismissed the rights of employers in this regard on the basis that child labour laws already limit employers' freedom to hire whomever they choose: Blades, above n 200, 1425. This logic is unconvincing. The fact that there may be reasonable limits imposed on the pool of candidates from which employers may hire hardly implies that employers ought to have no freedom in relation to the choice of who they do not (or no longer) hire.

recommended the employee's discharge and in many cases, the reinstated employee will work with this same supervisor if returned to work.²¹²

That is, it is not, in any practical sense, the faceless corporation that takes the decision to dismiss an employee but an individual who does so. An individual whose life has been affected by the conduct, performance or other issues that the employee has created that led to the decision to dismiss. It is the freedom of these individuals that is curtailed by an order of reinstatement.

The law has traditionally recognised the importance of protecting those freedoms. At common law and equity, if an employee is dismissed in breach of contract they are left to their remedy in damages. While it is true that equity's refusal to intervene with an order for specific performance is based on some practical and technical reasons, such as the fact such an order might require constant supervision by the court²¹³ or would conflict with the equitable requirement for mutuality,²¹⁴ it is more fundamentally based on the concern eloquently expressed by Fry LJ in 1890 in the case of *De Francesco v Barnum*:

²¹² West, above n 71, 52-3.

²¹³ The classic discussion is that of Megarry J in *Giles (C. H.) and Co Ltd v Morris* [1972] 1 WLR 307, 318: "The reasons why the court is reluctant to decree specific performance of a contract for personal services (and I would regard it as a strong reluctance rather than a rule) are, I think, more complex and more firmly bottomed on human nature. If a singer contracts to sing, there could no doubt be proceedings for committal if, ordered to sing, the singer remained obstinately dumb. But if instead the singer sang flat, or sharp, or too fast, or too slowly, or too loudly, or too quietly, or resorted to a dozen of the manifestations of temperament traditionally associated with some singers, the threat of committal would reveal itself as a most unsatisfactory weapon: for who could say whether the imperfections of performance were natural or self-induced? To make an order with such possibilities of evasion would be vain; and so the order will not be made."

²¹⁴ See, eg, *Page One Records and Another v Britton and Others* [1968] 1 WLR 157, 165 (Stamp J).

For my own part, I should be very unwilling to extend decisions the effect of which is to compel persons who are not desirous of maintaining continuous personal relations with one another to continue those personal relations. I have a strong impression and a strong feeling that it is not in the interest of mankind that the rule of specific performance should be extended to such cases.²¹⁵

The effect of an order for reinstatement for unfair dismissal is to do just what Fry LJ is concerned to avoid – the employer, and the individuals who constitute it, is compelled by law to maintain continuous personal relations with a previously dismissed employee, to entrust that employee with duties and to pay that employee wages in circumstances where the employer has previously determined that, for whatever reason, the employer’s enterprise would be better off without the employee.²¹⁶

While there may be sound public policy grounds for preserving reinstatement as a remedy where the reason for dismissal is *unlawful* (for example, the reason is unlawfully discriminatory) despite the concerns raised by Fry LJ,²¹⁷ there are no equally compelling grounds for doing so in relation to dismissals that are merely

²¹⁵ *De Francesco v Barnum* (1890) 45 Ch D 430, 438.

²¹⁶ The decision of the High Court of Australia in *Blackadder v Ramsey Butchering Services Pty Ltd* (2005) 221 CLR 539 confirms that a reinstatement order cannot be complied with simply by putting the reinstated employee on “gardening leave”. For a useful discussion, see McCrystal, above n 24.

²¹⁷ See, eg, J Hoult Verkerke, ‘Free to Search’ (1992) 105 *Harvard Law Review* 2080, 2089-94, 2096-7 (arguing, contrary to a position put forward by Professor Epstein, that overcoming discriminatory segregation in the South of the United States in the 1960s required the intervention of federal laws that compelled integration against the wishes of those who wished to continue contrary policies); Clark, above n 71, 541-2 (arguing that in cases of dismissal on unlawfully prejudicial grounds (such as because of trade union activities or race) the purpose of the remedy should be to stop the employer engaging in the conduct, not merely compensating the dismissed employee).

viewed by a third-party tribunal as *unfair* because of some procedural or reasoning defect attributed to the employer.

The interference with a person's right to control with whom they choose to maintain relationships has not been adopted in other areas in which the law regulates personal relationships – marriage, partnerships and agency. In these areas the law, rightly, does not purport to force together those who do not wish to be so. Indeed, in today's times, it would be almost unimaginable for the situation to be otherwise.²¹⁸ For example, regardless of the circumstances in which a marriage ends, there is no power for a court to say that the party seeking a divorce is doing so for unfair reasons or has failed to accord their spouse proper procedural fairness to answer criticisms about their personality and thus, as a consequence, to order that the couple must remain married.²¹⁹ Similarly, a court will not order specific performance of partnership or agency agreements where these involve the provision of personal services, to, in effect, force quarrelling parties to continue to attempt to work in one another's interests.²²⁰

Despite the apparent acceptance of the law's position in respect of marriage, partnerships and agency, the remedy of reinstatement for unfair dismissal exists as

²¹⁸ A recent newspaper article, drawing a similar analogy between dismissal and divorce, described the notion that a court might "reinstate" a marital relationship as "laughable": Gary Johns, 'Give Bosses the Right to Fire and They'll Hire', *The Australian* (Melbourne) 17 February 2011, 12.

²¹⁹ See *Family Law Act 1975* (Cth) s 48.

²²⁰ See *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 428 (Brennan CJ, Dawson and Toohey JJ). See also, *Cannavo v FCD (Holdings) Pty Ltd* [2000] NSWSC 304, [66] (Santow J): "There is indeed a cognate reason why specific performance should not be allowed. Clearly enough, this is a joint venture pleaded as such by the plaintiff. Entry into such a joint venture, or partnership as the plaintiff referred to it in cross-examination, would not be enforced by a court where relations had broken down."

an encroachment on the freedom of employers to be masters of their own relationships. The interference with employers' freedom that it necessarily entails means that reinstatement as a remedy for unfair dismissal should be regarded as unacceptable from a theoretical perspective.

Conclusion: the fairness of reinstatement to employers and employees alike

Overall, the justifications raised for employees enjoying a right to seek reinstatement in cases of unfair dismissal despite employers being denied a countervailing right are ultimately unsatisfying. Particularly given the large number of employees employed by small businesses in Australia, some employers are likely to experience particularly significant negative effects from an unfair resignation. These effects cannot be presumed to be negligible. More fundamentally, the interference with an employer's right to control who it maintains in its employment that the availability of reinstatement as a remedy for unfair dismissal entails, is inconsistent with basic notions of freedom and personal autonomy. In these circumstances, the availability to the employee of reinstatement as a remedy for unfair dismissal does not provide employers with a "fair go all round".

In light of the findings regarding the practical operation of the remedy regime for unfair dismissal contained in chapters 3 and 4, and the theoretical underpinnings of the remedy regime contained in this chapter, the following chapter of this thesis will address whether the existing remedy regime can be improved.

6.0 OPTIONS FOR IMPROVING THE CURRENT REMEDY REGIME

6.1 Introduction

This thesis has identified a number of problems, both in practice and in principle, with the current remedy regime for unfair dismissal in Australia. The purpose of this chapter is to explore the options available to address these problems and improve the operation of the system as a whole.

To that end, section 6.2 will begin the analysis by summarising the six separate problems that this thesis has identified with the way in which current remedy regime operates. Section 6.3 will then canvass the possible ways of addressing these problems, drawing, in particular, on remedial options or procedural tweaks that have previously been pursued in Canada and the United Kingdom. The conclusion reached in section 6.4 is that while there is no perfect solution, the best approach to resolving the problems identified in this thesis involves abolishing the remedy of reinstatement while at the same time significantly raising the current statutory cap on the amount of compensation that can be ordered. This, it will be argued, will represent a significant improvement to the system for employers, taxpayers and, perhaps counter-intuitively, unfairly dismissed employees as a whole. Indeed, it will be argued that of the people who could potentially be left worse off by the changes – the few unfairly dismissed employees each year who would otherwise have received the remedy of reinstatement – many, in fact, would likely be better off with more adequate compensation, rather than an order of reinstatement.

6.2 The six problems with the current remedy regime identified in this thesis

The empirical analysis set out in chapter 3 of this thesis resulted in two key findings in relation to the remedies that were being awarded in response to successful unfair dismissal claims in Australia. First, reinstatement was ordered very infrequently with only 21 out of 398 applicants being awarded the remedy between 1 July 2010 and 30 June 2011. The reluctance of Fair Work Australia to order reinstatement was shown not to be an aberration limited to the year under study, but consistent with historical data which indicated that in the previous five years, reinstatement was awarded in no more than 5 per cent unfair dismissal cases each year. This low frequency with which reinstatement is awarded is a problem, in the sense that it results in a significant discord between the language of the Fair Work Act (which indicates that reinstatement is intended to be the primary remedy for unfair dismissal) and the outcomes that unfairly dismissed employees achieve in practice (which indicates that compensation is clearly the predominant remedy). Second, where monetary compensation was awarded in lieu of reinstatement, the amounts of compensation ordered tended to be small, with the average being an order for \$11,244.19. Further, in only 4 per cent of cases in which compensation was ordered did the amount exceed \$30,000, with the single largest award being \$47,500. This would also seem to be a problem on the basis that such small monetary compensation awards appear unlikely to be “making whole” the actual losses suffered by unfairly dismissed employees, a key purpose of the remedy regime.

Chapter 3 of this thesis also demonstrated the third problem with the remedy regime – that these issues of infrequent reinstatement awards and low compensation orders were particularly acute in relation to self-represented applicants. The data revealed that no self-represented applicants at all were awarded the remedy of reinstatement during the period under study and the average compensation ordered in lieu of reinstatement was only \$9,140.60.

Chapter 4 of this thesis considered the issue of self-represented applicants in more detail and identified a fourth problem with the remedy regime – the divergence between the law as it appears on the books and how that law is actually applied in practice appears likely to lead to some self-represented applicants proceeding to litigation when it would be in their best interests to settle their claims.

Chapter 5 of this thesis then analysed the remedy regime from a theoretical perspective and argued that, for different reasons, neither of the available remedies – compensation and reinstatement – entirely satisfied the purposes intended to be served by the remedy regime. This gave rise to the fifth and sixth problems with the current remedy regime – monetary compensation may be incapable of entirely making whole the loss suffered by a person who has been unfairly dismissed, and reinstatement is a remedy that fails to accord “a fair go all round” to employers.

Having identified these six problems, the following section will canvass options for addressing them and thus improving the operation of the remedy regime as a whole.

6.3 Options for improving the remedy regime for unfair dismissal in Australia

In considering options for improving the remedy regime for unfair dismissal in Australia in light of the problems identified in this thesis, it is essential to first consider the parameters in which any solutions must operate. Specifically, Australia is not at liberty to adopt any remedial regime whatsoever when it comes to unfair dismissal; it is constrained by the obligations it has undertaken to comply with under the ILO's Termination of Employment Convention. Relevantly, article 10 of the Convention provides:

If the bodies referred to in Article 8 of this Convention find that termination is unjustified and if they are not empowered or do not find it practicable, in accordance with national law and practice, to declare the termination invalid and/or order or propose reinstatement of the worker, they shall be empowered to order payment of adequate compensation or such other relief as may be deemed appropriate.²²¹

Thus, in Australia, if Fair Work Australia were not empowered to order reinstatement as a remedy, it would be a requirement that Fair Work Australia be empowered to order payment of “adequate compensation” or “such other relief as may be deemed appropriate”. This fact will inform the ways in which the problems identified in this thesis can be resolved.

The most fundamental problem identified in this thesis is that, at least in the context of Australian employment law, reinstatement against the wishes of the employer is a remedy that is unsupportable in principle. As such, it is appropriate to

²²¹ United Nations International Labour Organisation, *Termination of Employment Convention*, 1982 (C158) <<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C158>>.

canvass options for dealing with this problem first. As will be shown, the way in which this problem is resolved may also have the effect of resolving some of the other problems with the remedy regime that have been identified.

(a) *Options for modifying the remedy of reinstatement*

If the argument that reinstatement against the wishes of the employer is unsupportable in principle is accepted, this has some profound implications for changes that would need to be made to the remedy regime for unfair dismissal in Australia. Indeed, there would appear to be only three options to address this issue:

- abolish the remedy of reinstatement for unfair dismissal altogether;
- provide that the remedy of reinstatement for unfair dismissal may only be ordered where the employer consents to the order (presumably in preference to the payment of monetary compensation); or
- provide that the employer can refuse to comply with an order for reinstatement, in exchange for paying the employee a specified amount over and above the monetary compensation that would have been awarded in lieu of reinstatement.

The first approach reflects that which was adopted under the only statutory unfair dismissal regime that exists in the United States, in the state of Montana. The *Montana Wrongful Discharge from Employment Act* provides, relevantly:

Remedies

§ 905. (1) If an employer has committed a wrongful discharge, the employee may be awarded lost wages and fringe benefits for a period not to exceed 4 years from the date of discharge, together with interest thereon. Interim earnings, including amounts the employee could have earned with reasonable diligence, must be deducted from the amount awarded for lost wages...²²²

In other words, reinstatement is not available in any circumstances, but monetary compensation in respect of lost remuneration is available in respect of a period of up to four years. Thus, an employee will be fully compensated for their monetary loss from an unfair dismissal so long as they can obtain new employment at the same or greater remuneration than they would have received in their previous job, within a period of four years.

The second approach, reinstatement only with the consent of the employer, reflects an approach that has been used under the prevailing unfair dismissal laws in Quebec.²²³ Specifically, such “facultative reinstatement orders”, as they have been described,²²⁴ are an alternative remedy that is available to the *Commission des normes du travail* in resolving unfair dismissal claims under section 128 of *An Act Respecting Labour Standards*, RSQ 1979, c N-1.1.

The third approach, a reinstatement order that the employer can refuse to comply with in exchange for the payment of greater monetary compensation to the

²²² *Montana Wrongful Discharge From Employment Act*, Mont Code Ann 39-2-901 §905 (1987).

²²³ See Trudeau, above n 54, 308.

²²⁴ Ibid.

unfairly dismissed employee, was an approach that was adopted in the United Kingdom in the 1970s and 1980s.²²⁵

As has been shown above, each of the three options would be permissible under Australia's treaty, so long as an appropriate alternative remedy, such as adequate compensation, remained available.²²⁶ Accordingly, choosing between these alternatives must be done on other grounds.

Of the three options, the latter two might at first seem preferable, on the basis that they at least preserve the potential of reinstatement (and thus a fully "make whole" remedy) to be awarded in cases where an employer is willing to attempt to get the employment relationship back on track. However, a more careful consideration reveals a particular risk associated with these options: an employer might accept a reinstatement order for less honourable reasons than a genuine desire to restore the employment relationship. Specifically, faced with a choice between paying full compensation to the dismissed employee (or possibly even full compensation plus some kind of additional component, as the third option entails) or reinstating a dismissed employee, an unscrupulous employer may choose the latter option in the hope that the employee will find returning to work sufficiently uncomfortable that they quickly resign. The effect of this would be that the employer no longer has to deal with the unwanted employee and the employer does not have

²²⁵ See, Sherman Jr, above n 23, 503-4; Williams and Lewis, 'Legislating Job Security: The British Experience of Reinstatement and Reengagement', above n 32, 484.

²²⁶ United Nations International Labour Organisation, *Termination of Employment Convention*, 1982 (C158), art 10 <<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C158>>.

to pay the employee any compensation. A win-win for the employer, but a substantial injustice for the employee.

The risk of this type of behaviour occurring in practice is heightened when it is considered that for the litigation to have reached the point at which the tribunal makes an optional reinstatement order, the employer must not have previously agreed to reinstate the employee of its own volition in order to settle the claim. While it may be the case that the employer sees the error of their ways only when the tribunal hands down its decision, it is perhaps more likely that a sudden willingness to reinstate the employee is the result of the employer recognising an opportunity for a less costly 'solution'.

Despite the fact that it might seem far-fetched in the abstract, empirical data supports the conclusion that this type of behaviour would occur in practice. Specifically, Williams and Lewis' conducted a study of five years' worth of reinstatement orders made in United Kingdom in the 1970s under such an optional reinstatement regime. They found an alarming level of reinstated employees resigning shortly after they returned to their previous employment.²²⁷ Frequently, these employees cited harassment or other unfair treatment by their employer post-reinstatement as the reason for their resignation.²²⁸ In such situations, the employee is clearly left significantly worse off (and the employer better off) than if

²²⁷ Williams and Lewis, 'Legislating Job Security: The British Experience of Reinstatement and Reengagement', above n 32, 487-8: "26 percent of men and 42 percent of women who went back stayed for less than six months".

²²⁸ Ibid 490: "The experience of those who actually went back, on the other hand, appears to be a matter for concern... Taken at face value, it is disturbing that a quarter of all those who were reemployed felt they had been subjected to unfair treatment and that one-half of employees who went back and subsequently left (as distinct from those dismissed a second time) attributed their leaving to this cause".

the tribunal had ordered that the employer pay compensation in lieu of reinstatement in the first place.

In the face of this reality, it would appear that neither of the alternatives to abolishing the remedy of reinstatement to solve the problem of principle identified in this thesis is satisfactory. Both alternatives create a real possibility that unfairly dismissed employees may suffer further injustice.

Indeed, even if the reader does not accept my argument that reinstatement as a remedy is unsupportable in principle, it may still be the case that it is worthwhile to remove reinstatement as a remedial possibility. This is because the risk that reinstatement will be unworkable in practice (and thus that an employee might be forced to resign shortly after returning to their previous employment) is present, regardless of whether reinstatement is at the option of the employer. As Professor England put it in his article reviewing the Canadian federal unfair dismissal protections which provide for compulsory, as opposed to optional, reinstatement:

[T]he practical difficulties of making reinstatement succeed in the face of employer opposition are almost insurmountable. Although flagrantly disobeying a reinstatement order may ultimately result in the employer being found in contempt of court, the employer may take the worker back but make life so miserable that the employee is eventually driven to resign. Indeed, a worker who resigns shortly after being reinstated may be worse off financially than if he or she had been initially awarded compensation on a "make whole" basis. The employer, therefore, may ultimately succeed in being rid of the employee.²²⁹

²²⁹

Geoffrey England, 'Section 240 of the *Canada Labour Code*: Some Current Pitfalls' (1999-2000) 27 *Manitoba Law Journal* 17, 29 (footnotes in original omitted).

Professor Weiler, considering potential remedial options available to non-unionised employees in the United States, put the point in a similar fashion:

It is quite another thing to try to reinstate a worker in his old job in the plant and expect the relationship to be restored as though no serious rupture had occurred. The reality is that the employee must return to work under the same manager who dismissed him in the first place, a manager who likely feels aggrieved at losing face by having his authority and judgment successfully challenged, and who still wields enough power over the employee to make life on the job for him very uncomfortable for him – and even, if he is determined, to force the employee out of the job, whatever the law might have ordained.²³⁰

While studies have shown some success in reinstatement orders made pursuant to grievance arbitration in unionised workplaces in Canada,²³¹ for example, even proponents of such approaches, like Professor Weiler, accept that reinstatement is not an effective remedy in unorganised workplaces, where a union is not available to protect reinstated employees from reprisals from their employers.²³²

Collateral implications of abolishing reinstatement as a remedy

If reinstatement were to be abolished (or indeed made to be at the employer's option) this would have two main collateral implications for dismissed employees, one good and one bad.

First, the bad: employees would lose what might often be a significant bargaining chip in seeking to settle unfair dismissal claims prior to hearing. On the

²³⁰ Weiler, above n 10, 86.

²³¹ See, eg, Barnacle, above n 57, 302.

²³² Weiler, above n 10, 103-4. See also, West, above n 71, 39-40.

face of it, the risk of a dismissed employee being forced back on to an unwilling employer is likely to be viewed as a powerful incentive for that employer to agree to settle an unfair dismissal claim on terms not involving reinstatement. Whatever else may be said of the current remedy regime, it is extremely successful in generating settlements and avoiding public resources being expended on litigating the vast majority of unfair dismissal claims. If tinkering with the remedy regime jeopardised these settlement rates, then such a course of action may not be worthwhile. Accordingly, it is necessary to consider how the alternative compensation remedy should operate to ensure dismissed employees remain in a reasonable bargaining position in relation to the settlement of claims. This will be discussed further in section 6.3(b) below.

Second, the good: the abolition of reinstatement as a remedy would resolve the problem that the law on the books in relation to remedy for unfair dismissal does not match the operation of the law in practice. That is, if compensation was the only available remedy for unfair dismissal, then the inconsistency between the Fair Work Act emphasising reinstatement as the primary remedy while Fair Work Australia in fact orders it very rarely, would no longer be an issue.

A corollary of this is that the abolition of reinstatement as a remedy would likely resolve the problem of self-represented applicants failing to settle unfair dismissal claims in circumstances where it would be rational for them to do so. It will be recalled that the key explanation for this conduct was that self-represented applicants are likely to significantly overestimate the probability of receiving the remedy of reinstatement at hearing. Obviously, if the remedy of reinstatement were

not available at all, self-represented applicants would not have this problem. Furthermore, it is significantly easier for a lay person to predict the value of the compensation they are likely to be awarded if successful at hearing because of the well-publicised statutory cap and the clearly stated factors which go into calculating the amount of an award. As such, in a remedy regime where capped compensation is the only option, self-represented applicants are far less likely to over-value their claim to such an extent that they fail to accept a settlement offer which it would be in their interests to accept.

Nonetheless, there are clearly less drastic and more direct ways of solving the problem of the law on the books not matching the law as it operates and the implications that follow for self-represented litigants settling their claims. For example, the language of the Fair Work Act could be changed to place less emphasis of reinstatement as a remedial possibility. Alternatively, and more achievable in the immediate term, Fair Work Australia could simply publish information that makes clear the practical reality that reinstatement is rarely awarded, particularly to self-represented applicants. Such information coming from a neutral body, rather than an employer's lawyer as is often the case today, is far more likely to be effective in making self-represented applicants appreciate the reality of the situation they are in.

Alternatively, although along the similar lines, Fair Work Australia could take a more interventionist role in conciliating unfair dismissal claims, with conciliators providing the parties with greater guidance on what they consider will be the likely outcomes if the parties do not settle and proceed to hearing. Under the present

system, conciliations are usually very brief and almost exclusively conducted by telephone²³³ and, in practice, conciliators are loath to provide any indication of their view of the merits of the case or the likely remedy should the applicant be successful.²³⁴ This approach, while preserving the conciliator's appearance of neutrality, does little to assist a self-represented applicant to have realistic expectations about the outcome that is likely to result from a hearing of their claim. A more interventionist approach, with conciliators describing to the parties the outcome which they perceive is likely based on the information before them, could provide a useful reality check to parties who have an overly optimistic view of their prospects.²³⁵

Another option to respond to this issue would be to attempt to reduce the number of applicants who are self-represented by taking steps to increase the availability of affordable representation. With legal aid already struggling to fund lawyers for those being prosecuted for criminal offences,²³⁶ it seems unlikely that the public purse will stretch to providing legal aid for applicants seeking to agitate unfair

²³³ Jennifer Acton, 'Where have all the cases gone? Voluntary resolution of unfair dismissal claims' (Paper presented at the ALLA National Conference 2010, Adelaide, 19 November 2010) 1-2.

²³⁴ But see *ibid* 2: "The conciliators are trained to play a more activist role in the conciliation than would a "traditional" mediator... Their activist role may extend to such matters as... reality testing their proposed remedy against remedies available under the Fair Work Act." While currently conciliators may explain the possible remedies that are available, such as the statutory cap on the amount of compensation that may be ordered, that alone does not provide much "reality testing" for self-represented applicants who erroneously believe that they are likely to be reinstated when that is not the case.

²³⁵ A similar approach, albeit in the context of the mediation of disputes arising in the course of collective bargaining, proved very successful in minimising litigation and promoting enduring agreements in British Columbia, Canada: Melanie Vipond, 'First Contract Arbitration: Evidence from British Columbia of the Significance of Mediators' Non-Binding Recommendations' (2011) 62(3) *Labor Law Journal* 145, 169.

²³⁶ See, eg, Samantha Bowers, 'Budget fails justice system', *The Australian Financial Review* (Sydney) 6 May 2011, 47; Amelia Bentley, 'Judge slams Legal Aid "starving"', *Brisbane Times* (Brisbane) 14 August 2010 <<http://www.brisbanetimes.com.au/queensland/judge-slams-legal-aid-starving-20100813-122pr.html>>.

dismissal claims. However, although traditional contingency fee arrangements (whereby the lawyer's fee is a function of the settlement amount or award received by the client) are prohibited in Australia,²³⁷ there remains the possibility of lawyers agreeing to operate on a "no win – no fee" basis in respect of unfair dismissal matters.²³⁸ While this type of billing arrangement does not appear to have gained traction to date, it might prove to be more attractive, both to lawyers and applicants, if the statutory cap on the amount of compensation that may be awarded in respect of an unfair dismissal is increased in the future.²³⁹

Alternatively, looking at the problem from the other perspective, steps could be taken to encourage or require Fair Work Australia to order reinstatement as a remedy more often, so that it does indeed become the primary remedy for unfair dismissal in Australia.²⁴⁰ However, given the concerns raised in this thesis with reinstatement against the will of an employer being available as a remedy for unfair dismissal, such an approach to resolving the discordance between the law on the books and the law in practice does not seem desirable.

Conclusion regarding options for modifying the remedy of reinstatement

Overall, abolishing reinstatement as a remedy for unfair dismissal would appear to be the best way of solving the main problem of principle with the remedy regime that was identified in this thesis – that reinstatement against the will of an

²³⁷ See, eg, *Legal Profession Act 2004* (NSW) s 325.

²³⁸ See, eg, *Legal Profession Act 2004* (NSW) s 324.

²³⁹ The merits of raising the statutory cap on compensation awards are discussed in more detail in the following subsection of this thesis.

²⁴⁰ For an argument to this effect, see David Lewis, 'Note: Re-Employment as a Remedy for Unfair Dismissal: How can the Culture be Changed?' (1999) 28(2) *Industrial Law Journal* 183.

employer does not accord the employer a “fair go all round”. If reinstatement were to be abolished, two other problems identified in this thesis – the discordance between the law on the books and the operation of the law in practice, and the fact this leads to self-represented litigants failing to settle claims when it would be in their interest to do so – would also be resolved.

Two main issues would then remain:

- the practical problem that monetary compensation ordered in lieu of reinstatement often seems to be unreasonably small in quantum; and
- the problem of principle that compensation as a remedy may be incapable of fully making whole the losses suffered by an unfairly dismissed employee because of the intangible benefits they may have derived from their employment.

The options available to modify the compensation remedy to attempt to resolve both of these problems will be canvassed in the following section.

(b) Options for modifying the remedy of compensation

Whether or not reinstatement is retained as a remedy for unfair dismissal, options for improving the operation of compensation as a remedy are worthy of some consideration. After all, reinstatement orders directly affect relatively few unfairly dismissed employees each year (only 21 in the year that was examined in the empirical study contained in this thesis); compensation orders affect many more (indeed, approximately five times as many in the year under study).

If compensation awards are regarded as generally being too small, there are two options available to address this issue:

- (a) change the method by which compensation awards are calculated; or
- (b) increase the statutory cap on the amount of compensation that Fair Work Australia is empowered to order.

The merits of each option will be considered in turn.

Should the method by which compensation orders are calculated be changed?

The approach that is required to be used to determine compensation awards is that which was set out in the case of *Sprigg*.²⁴¹ This five step approach, which was discussed earlier in this thesis,²⁴² should, if applied properly, provide unfairly dismissed employees with compensation equal to the full financial loss which they have suffered as a result of the dismissal, subject to the operation of the statutory cap. Accordingly, there is no obvious reason for changing the method by which compensation is calculated. That is, if the process was being applied properly, then the average compensation that was ordered during the period under study – \$11,244.17 – while it might appear low, should accurately reflect the financial loss suffered by the average unfairly dismissed employee who was awarded compensation during the period.

However, on reading the decisions, it becomes clear that the five step process in *Sprigg* was not always applied properly. While it is accepted that some of

²⁴¹ *Sprigg v Paul's Licensed Festival Supermarket* (1998) 88 IRJ 21, 29.

²⁴² See section 5.3(a) of this thesis above.

the elements of *Sprigg* are speculative and thus difficult to quantify (for example, determining how long an employee would have remained employed but for the unfair dismissal), there were a number of cases where Members simply did not attempt to apply the process at all.²⁴³ In other cases, Members gave lip service to having taken into account the process set out in *Sprigg* but in fact appeared to simply pull out of thin air the amount of compensation to be awarded.²⁴⁴ Where this occurs, it is highly unlikely that the compensation ultimately awarded will fully reflect the loss suffered by the unfairly dismissed employees. Indeed, there is a risk that attention will be focused on the relative egregiousness of the employer's conduct instead of on the actual loss suffered by the employee.²⁴⁵ For the remedy of compensation to live up to its potential, a more disciplined approach to the calculation of compensation by Fair Work Australia is required than was demonstrated in the cases decided during the period under study.

Obviously, it is open to litigants who are the victims of a lax approach to the calculation of compensation to seek to have this error corrected on appeal (and,

²⁴³ See, eg, *Shane Withers & Karl Peterson v S & J Hire Pty Ltd* [2011] FWA 2556, [23]-[25]; *DL v BKC* [2010] FWA 5659, [56]-[61]. In the latter case, the applicant had not obtained employment subsequent to his dismissal and the Member in the case concluded that but for the dismissal "there is no reason to believe that [the applicant] would not have continued in employment with BKC for many years to come". Despite this, the Member ordered compensation equivalent to only six week's salary.

²⁴⁴ See, eg, *Mrs Carolyn Bolger v Shamrock Consultancy Pty Ltd T/A Allied Express* [2010] FWA 6723, [49]; *Nathan McFarlane v Dcomp Pty Ltd T/A Dcomp* [2010] FWA 9191, [47].

²⁴⁵ Indeed it appears that the Full Bench of Fair Work Australia fell into this error, albeit in *obiter dicta*, in considering an appeal in which only a small amount of compensation had been ordered by the Member at first instance: *Mr Stephen O'Loughlin v APS Group (Placements) Pty Ltd* [2011] FWA 5230, [62] ("We can see no proper basis for interfering in the Commissioner's decision in relation to remedy. The Commissioner ordered compensation equivalent to four weeks' pay when the maximum amount of compensation is 26 weeks' pay. The relative modesty of that award no doubt reflected the surrounding circumstances including the employee's initial false denials and anti-Semitic sentiments expressed during the disciplinary interview.")

indeed, some litigants did so and were successful).²⁴⁶ However, parties should not be put to the trouble and expense of bringing an appeal in order to ensure that the level of compensation ordered is a true reflection of the financial loss actually suffered by the unfairly dismissed employee.

Nonetheless, the fact that Members in some cases have not been applying the law properly in this regard does not suggest that any modification to the method of calculation of compensation is required. It indicates only that Members should remind themselves of the purpose which remedies for unfair dismissal are intended to serve, and redouble their efforts to follow the process which, to the extent possible, ensures that that purpose is achieved.

Putting to one side cases involving errors in approach, small compensation orders were generally made on the basis of findings by Fair Work Australia either that the employee had obtained alternative employment,²⁴⁷ or that, absent the unfair dismissal, the employment would have shortly come to an end anyway.²⁴⁸ To the extent that these findings accurately reflect the evidence, it is appropriate, and in accordance with the process set out in *Sprigg*, that these factors reduce the amount of compensation ordered, so as to avoid unjustly enriching the unfairly dismissed employee. Accordingly, there is no basis for changing the method of calculating compensation to increase monetary awards on the basis of these factors.

²⁴⁶ See, eg, *Tabro Meat Pty Ltd v Kevin Heffernan* [2011] FWAFB 1080.

²⁴⁷ See, eg, *Mrs Linda Kaur v Services Management International Pty Ltd T/A SMI Security Group* [2011] FWA 2295; *Gary Fowler v Tramic Pty Ltd T/A Carrum Downs Regional Shopping Centre* [2011] FWA 2143.

²⁴⁸ See, eg, *Richard O'Connor v Outdoor Creations Pty Ltd* [2011] FWA 3081, [68]. In that case, Fair Work Australia found that the applicant had intended to resign from his employment the day after he was unfairly dismissed. As such, the compensation ordered was equivalent to a single day's pay.

There were also 15 cases where the dismissed employee's misconduct contributed to the unfair dismissal.²⁴⁹ In such cases, the Fair Work Act requires that Fair Work Australia reduce the amount of compensation it would otherwise order by an "appropriate amount on account of the misconduct".²⁵⁰ The rationale for such a reduction is presumably²⁵¹ that the employer would have been entitled to suspend or otherwise discipline the employee (in a manner short of termination) for their misconduct, which would have reduced the remuneration which they would have received had their employment continued. Again, then, to the extent that the reduction is commensurate with the seriousness of the misconduct, it is appropriate that this factor reduce the amount of compensation ordered in order to avoid unjustly enriching the unfairly dismissed employee. Accordingly, there is no basis for modifying the method of calculating compensation to increase monetary awards on the basis of this factor either.

The final factor that could explain unreasonably small compensation awards is the operation of the statutory cap on compensation orders. As such, it is worth considering whether increasing or abolishing the statutory cap is warranted.

Should the statutory cap on compensation amounts be modified?

The statutory cap on the amount of compensation that Fair Work Australia is empowered to order had the effect of preventing unfairly dismissed employees from

²⁴⁹ See, eg, *Mr Richard Paternella v Electroboard Solutions Pty Ltd* [2011] FWA 3323; *Ms Lorraine Lesley Victorena Williams v Larrakia Nation Aboriginal Corporation* [2011] FWA 3939; *Mr Gregory Wayne Jarvis v Anderson Plumbing & Roofing Pty Limited* [2010] FWA 8896.

²⁵⁰ *Fair Work Act 2009* (Cth) s 392(3).

²⁵¹ The explanatory memoranda to the Fair Work Bill 2008 is silent on the point.

receiving full compensation in respect of their dismissal in 13 of the cases in my study.²⁵² If compensation is intended to attempt to make whole the losses suffered by unfairly dismissed employees as a result of their dismissal, there is really no justification for this.

Given the low level of the cap – equivalent to six months' remuneration of the dismissed employee – it may be that some unfairly dismissed employees are left without any compensation in respect of a significant period of time that they are out of work. This was the point made by Professor Stewart in considering the statutory cap on compensation for unfair dismissal that applied under the *Industrial Relations Act 1988* (Cth):

The effect [of a cap on compensation] is likely to be severe on those whose age or lack of skills means that they must face much more than six months, and possibly the remainder of their 'working life', out of a job. For plaintiffs such as these, the cap represents a severe restriction on their capacity to secure adequate compensation... All the more reason, therefore, not to fetter in so arbitrary a fashion the Court's power to do justice between the parties.²⁵³

Professor Stewart's argument is persuasive and has not lost any of its cogency over time. On the face of it, then, there is a strong case for modifying the remedy regime under the Fair Work Act to remove the statutory cap on compensation. Indeed, such

²⁵² See, eg, *Stephen Pitceanthly v Diona Pty Limited* [2011] FWA 1793; *Mr Simon Charles Wogan v Plantbiz Pty Ltd T/A Bondi Gardens* [2010] FWA 5119; *Mr Ronald Jasen Worth v Sunshine Sydney Pty Ltd T/A The Big Pineapple* [2010] FWA 9332.

²⁵³ Stewart, above n 118, 116-17. See also, *Wheelright*, above n 24, 192.

an approach has been adopted without apparent controversy in some other jurisdictions, such as under Canada's federal unfair dismissal laws.²⁵⁴

Removing the statutory cap on compensation appears to have particular merit if, as I have suggested, the remedy of reinstatement is also to be abolished. If the maximum compensation that Fair Work Australia can award is limited to only six months' remuneration, unfairly dismissed employees will have few bargaining chips in attempting to negotiate a reasonable settlement of their claim. That is, with no possibility of reinstatement and a maximum compensation pay-out of only six months' remuneration, an employer has a fairly encouraging worst case scenario from proceeding to hearing, while an unfairly dismissed employee's best case scenario is fairly bleak. While in and of itself this fact is unlikely to reduce rates of settlement,²⁵⁵ it is likely to reduce the amounts paid by employers to dismissed employees in settlement of unfair dismissal claims. This is because the value of the remedy that Fair Work Australia is likely to order in the absence of reinstatement as a remedial possibility is necessarily lower than it is where reinstatement remains a possibility. Given that average compensation awards already seem small in the presence of reinstatement as a remedial possibility, reducing settlement amounts further would not seem to be a desirable outcome.

Nonetheless, there are some pragmatic reasons for having some kind of statutory cap on the amount of compensation that can be awarded. Indeed, other

²⁵⁴ See *Canada Labour Code*, RSC 1985, c L-2, s 242(4).

²⁵⁵ The quantum of the likely remedy is basically immaterial to the decision to settle as long as the parties have a similar view regarding what it will be: see Shavell, above n 6, 402-3.

jurisdictions, such as Montana in the United States,²⁵⁶ have seen the value of such an approach. The principle benefit of a cap on compensation is that it provides the parties to an unfair dismissal claim with clear parameters around the quantum of the monetary remedy which may be ordered if the matter proceeds to hearing. This facilitates the settlement of claims and also can operate as a useful restraint on applicants' expectations as to remedy. That is, particularly for self-represented applicants, the absence of a cap on monetary compensation may lead applicants to imagine that they are likely to receive enormous awards because of the high degree of unfairness which they perceive they have suffered in respect of their dismissal. Such expectations may not reflect a realistic estimation of their true financial loss and may result in a similar problem to that which was identified earlier in this thesis regarding self-represented applicants' refusal to settle claims when it was in their interest to do so.

Another benefit which a statutory cap provides is to prevent rogue Members from being tempted to make unreasonably large awards in cases of particularly egregious unfairness by employers, rather than holding true to the principle that is intended to underpin the remedy regime – compensating unfairly dismissed employees wholly, but solely, for their losses.

Given the value of a high settlement rate in reducing the cost to the taxpayer of unfair dismissal claims, it would seem that a compromise position with respect to a statutory cap on reinstatement would be best. That is, the statutory cap should not

²⁵⁶ See, *Montana Wrongful Discharge From Employment Act*, Mont Code Ann 39-2-901 §905 (1987).

be discarded completely (which might jeopardise settlement rates) but, rather, it should be increased to ensure that more employees receive a compensation amount which is closer, if not always exactly equal to, the losses which they suffer as a result of being unfairly dismissed (reflecting the overall purpose of the remedy regime).

In that regard, earlier in this thesis I argued that the value of reinstatement to an employee is generally very unlikely to exceed three years' remuneration.²⁵⁷ A statutory cap of this size would ensure that employees whose lives are worst affected by an unfair dismissal receive appropriately sizeable compensation in recognition of that fact, while also preserving the important role that a realistic cap on compensation provides in facilitating the settlement of claims. Such a change to the remedy regime would not affect the outcomes of cases for the vast majority of unfairly dismissed employees (whose losses from the dismissal will not exceed six months remuneration), but will be a positive change, and one in accordance with the purposes of the remedy regime, for the minority of unfairly dismissed employees each year whose losses from dismissal will exceed six months' remuneration.²⁵⁸

Accordingly, the option of modifying the remedy of compensation to raise the statutory cap from six months' remuneration to three years' remuneration would appear to be the best option to resolve, at least in part, the issue of current

²⁵⁷ See section 4.1(b) of this thesis.

²⁵⁸ In circumstances where Fair Work Australia is contemplating making a compensation order in respect of a lengthy period of time, as this proposed increase to the statutory cap would permit, there may be a need for the tribunal to retain jurisdiction and require that order to be paid by periodic instalments. This would enable Fair Work Australia to ensure that the unfairly dismissed employee is not unjustly enriched by the order by periodically requiring the unfairly dismissed employee to show that they had been taking adequate steps to mitigate their losses (that is, looking for work) to justify the payment of next instalment.

compensation orders failing to reflect the losses actually suffered by unfairly dismissed employees.

6.4 Summary of recommendations

This chapter has considered a number of possible options for modifying the remedies of compensation and reinstatement to resolve the problems identified in this thesis with the way in which the remedy regime for unfair dismissal in Australia operates at present. Having reviewed the merits of the available options, it has been argued that the remedy regime can best be improved to address these problems by:

- (a) removing from Fair Work Australia the power to order reinstatement as a remedy for unfair dismissal; and
- (b) increasing the statutory cap on compensation that Fair Work Australia is empowered to award from six months' remuneration to three years' remuneration.

Taken together, these two changes should resolve five of the six problems identified in this thesis with the operation of the current remedy regime. There will no longer be the problem of principle associated with employers being ordered against their will to retain in their employment a person whom they do not want. Compensation orders will better be able to make whole the financial losses suffered by unfairly dismissed employees who are likely to have difficulty obtaining alternative employment. The law on the books with respect to unfair dismissal will no longer

bear little resemblance to the law as it operates in practice, assisting self-represented applicants to better assess the merits of settlement offers they receive and to achieve better outcomes at hearing. The proposed changes will also have the added benefit of not jeopardising the high rates of settlement that are a feature of the existing system and which are of significant benefit to taxpayers who bear the burden of funding Fair Work Australia's operations.

However, these modifications to the remedy regime, to provide only monetary compensation for unfairly dismissed employees, still leave one problem unanswered. This is the problem that monetary compensation, of its nature, may be incapable of fully making whole the loss of intangible benefits that some unfairly dismissed employees may have derived from their previous employment. The solution proposed, it must be accepted, is not a perfect one. Unfortunately, that is a function of the exercise – as Professor Giles Trudeau, a Canadian scholar, has eloquently put it, “[n]o known remedy offers a universally acceptable solution to unjust dismissal”.²⁵⁹ However, this fact should not be seen as a reason for neglecting to pursue changes that can result in a significant improvement to the operation of the system, even if those changes do not make the system perfect.

Furthermore, and importantly, the practical impact of this flaw in the proposed modified remedy regime is likely to be minimal. The only dismissed employees who would be directly affected by the absence of reinstatement as a remedial possibility are those very few each year who would have sought reinstatement and would otherwise have been awarded it. Moreover, many of these dismissed employees

²⁵⁹ Trudeau, above n 54, 313.

may, in fact, be better off with the possibility of a larger compensation award to provide them with adequate opportunity to obtain a suitable new job, rather than reinstatement which may prove unpleasant or unworkable and ultimately result in their resignation, leaving them without work and without compensation.

Overall, if we accept that justice requires a remedy for employees who are unfairly dismissed, as our treaty obligations say that we must, we are left with choosing the best remedy regime from a variety of less than perfect options. I suggest that, in the context of Australia's system of employment and industrial relations, the remedy regime proposed in this chapter represents a significant improvement on the current regime and the best option that is available overall.

7.0 CONCLUSION

7.1 The problem

This thesis began by noting that while the merits of unfair dismissal laws themselves had been comprehensively debated in the existing literature, the same level of rigorous analysis had not been applied to considering the remedy regime that should be adopted to best give effect to those laws. In view of the number of countries around the world that have implemented statutory protections for employees against unfair dismissal, the general failure by commentators to give the issue of remedy more than cursory attention represented a significant gap in the literature.

The aim of this thesis was to attempt to go some way to filling that gap. In order to do so, the following question was posed: what remedies should be available to employees in Australia who have been unfairly dismissed? In order to provide robust answers to this deceptively simple question, it was necessary to analyse, from both a practical and theoretical perspective, the existing remedy regime for unfair dismissal in Australia and the purposes sought to be achieved by it.

7.2 The analysis

This process of analysis began with an exploration in chapter 2 of the historical background to the current remedy regime for unfair dismissal in Australia to provide context to the way in which the system operates today.

Having established that context, it was appropriate to next examine how the remedy regime for unfair dismissal was operating in practice. However, the absence of any current data available in the existing literature to support such an examination meant that an original study had to be undertaken. Chapter 3 described the outcome of this undertaking, a comprehensive empirical analysis of all 512 decisions issued by Fair Work Australia during the most recent financial year in Australia – the period from 1 July 2010 to 30 June 2011. The value of this undertaking was shown in the significant problems that the study identified with the operation of the current remedy regime, which would not have been apparent from an examination of the law on the statute books alone. Chief among these was the divergence between the operation of the law in practice with respect to the infrequency with which reinstatement was ordered as a remedy and the law as it appeared on the books, which emphasised the primary nature of reinstatement as a remedy. In addition, the empirical analysis revealed the small amounts of monetary compensation that tended to be awarded by Fair Work Australia in lieu of reinstatement, casting doubt on the likelihood that compensation was “making whole” the losses suffered by unfairly dismissed employees. Further, the empirical analysis was able to place in sharp relief the greater seriousness of each of these problems for self-represented applicants.

This last finding also pointed to a further potential issue that appeared to be affecting self-represented applicants within the system – the divergence between the law on the books and the law in practice appeared to be causing self-represented applicants to reject settlement offers which it was in their interests to accept.

Chapter 4 explored this issue in more detail and, using a traditional microeconomic model informed by data obtained from the empirical analysis, established that the average self-represented applicant who proceeded to hearing during the period did, indeed, likely fail to act in their own interests.

Having analysed the practical operation of the current remedy regime, the focus of the investigation then turned to its theoretical underpinnings. To that end, chapter 5 explored the purposes that Parliament intended to be served by the remedy regime and then sought to determine whether the remedy regime as it stands is capable of living up to those purposes. The outcome of this analysis was that neither of the existing remedies of reinstatement or compensation were entirely satisfactory from a theoretical perspective. The most significant problem of principle, however, related to the remedy of reinstatement and the fact that in the context of Australia's employment laws as a whole, ordering reinstatement of dismissed employees against the will of their former employers, denies employers the "fair go all round" that the statute requires.

Chapter 6 sought to bring all of the preceding analysis together to summarise the problems with the current remedy regime that had been identified in the thesis and to explore options for modifying the available remedies to best address them. Ultimately, the solution recommended was that reinstatement should be removed as a remedial possibility and the cap on the compensation that can be awarded to unfairly dismissed employees should be significantly increased. While this is not a perfect solution to the problem of giving effect to statutory unfair dismissal laws, it is

the best solution for the real world and one that appropriately balances the interest of unfairly dismissed employees, employers, and taxpayers alike.

7.3 The implications

While this thesis focused on the Australian jurisdiction, many of the findings and arguments are likely to be applicable to remedy regimes for unfair dismissal throughout the world. In that regard, it is hoped that this thesis will contribute to renewed, and more profitable, debate among academics, practitioners and policy-makers worldwide about how unfair dismissal laws should be implemented in practice, moving beyond the now stale arguments over whether unfair dismissal laws should be implemented at all.

This thesis also demonstrated the importance of empirical studies for identifying problems and generating practical solutions regarding the implementation of unfair dismissal laws, pointing the way to further avenues of worthwhile research in the future. In particular, in countries such as Canada and the United Kingdom that have well established unfair dismissal laws, updated research on how these laws are operating in practice would be invaluable for assessing whether or not they could be made fairer, or better, or more effective. It is hoped that this thesis could provide a template that others might follow in that regard.

Further, while the particular focus of this thesis has been squarely on remedies, the data obtained from the empirical study undertaken provides scope for a wide array of different analyses. With the benefit of this data, future researchers can explore other persistent questions that relate to the outcome of unfair dismissal

cases in Australia, such as the common allegations that some Members are biased in favour of employees and unions²⁶⁰ or that the involvement of lawyers in hearings reduces their length.²⁶¹ It is hoped that the data generated in the course of writing this thesis will enable these and other questions to be tackled with greater ease.

7.4 An old answer to a new question

In the context of a literature where the question of whether or not unfair dismissal laws are desirable has been extensively debated, this thesis has sought to shift the focus of the debate to a new question: accepting that unfair dismissal laws do exist, what remedies should be available to employees who have been unfairly dismissed?

Taking the case of Australia, this thesis has argued that the current remedy regime would benefit from a change in approach, whereby the focus shifts to properly compensating unfairly dismissed employees for their financial losses, encouraging them to find alternative employment and move on with their lives, rather than facilitating their return to their former employment. Ultimately, this suggestion, although it might at first seem radical in jurisdictions where reinstatement has been the traditional focus, echoes an old truth:

If the relation of employer and employee is to be of value or profit to either it must be marked by some degree of mutual confidence and satisfaction, and when these are gone and their

²⁶⁰ See, eg, Paul Gollen, 'Whiff of bias in Fair Work Australia posts', *The Australian Financial Review* (Sydney) 2 September 2010, 63.

²⁶¹ See, eg, James Eysers and Alex Boxsell, 'Revolt at unfair dismissal snub', *The Australian Financial Review* (Sydney) 26 September 2008, 49.

places usurped by dislike and distrust, it is to the advantage of all concerned that their relation be severed.²⁶²

The answer, then, that this thesis offers to the question of what remedies should be available to employees in Australia who have been unfairly dismissed is this: one remedy only – appropriate monetary compensation reflecting the actual losses suffered by the unfairly dismissed employee, subject to a generous statutory cap. It is an answer, as I have argued, that can be fairly regarded as being to the advantage of all concerned.

²⁶² *H W Gossard Co v Crosby*, 132 Iowa 155, 164 (1906).

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APPENDIX

Note: The following table is a summary of the data obtained in the course of undertaking the empirical study described in chapter 2 of this thesis. For reasons of space, this table records only 10 of the 30 metrics for which data was recorded. An electronic version of the spread sheet containing the data in relation to all 30 metrics can be obtained from the author on request.

Citation	Hearing days	Employer represented	Employee represented	Jurisdictional challenge successful	Dismissal held to be unfair	Reinstatement requested	Remedy	Amount backpay	Amount compensation
[2010] FWA 10117	4	Lawyer	Lawyer	N/A	Yes	Yes	Reinstatement	Unknown	N/A
[2010] FWA 1822	1	Lawyer	Lawyer	N/A	No	Yes	None	N/A	N/A
[2010] FWA 2686	1	Self-represented	Self-represented	N/A	No	Unknown	None	N/A	N/A
[2010] FWA 3856	1	Lawyer	Union	N/A	No	No	None	N/A	N/A
[2010] FWA 4230	6	Lawyer	Lawyer	N/A	Yes	Yes	Reinstatement	Unknown	N/A
[2010] FWA 4256	1	Lawyer	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 4522	2	Self-represented	Self-represented	No	Yes	No	Compensation	N/A	3,920.00
[2010] FWA 4548	1	Self-represented	IR Consultant	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 4626	1	Self-represented	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 4668	1	Self-represented	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 4678	2	Self-represented	Lawyer	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 4797	2	Union	Union	N/A	No	Unknown	None	N/A	N/A
[2010] FWA 4858	1	Lawyer	Lawyer	N/A	Yes	No	Compensation	N/A	Unknown
[2010] FWA 4917	4	Lawyer	Union	N/A	No	Yes	Reinstatement	N/A	N/A
[2010] FWA 4940	1	N/A	Union	N/A	Yes	No	Compensation	N/A	Unknown
[2010] FWA 4945	3	Lawyer	Union	N/A	Yes	No	Compensation	N/A	Unknown
[2010] FWA 4961	2	Union	Lawyer	N/A	Yes	No	Compensation	N/A	22,508.50

Citation	Hearing days	Employer represented	Employee represented	Jurisdictional challenge successful	Dismissal held to be unfair	Reinstatement requested	Remedy	Amount backpay	Amount compensation
[2010] FWA 5066	2	Lawyer	Self-represented	N/A	No	Unknown	None	N/A	N/A
[2010] FWA 5072	2	Lawyer	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 5119	1	Self-represented	Self-represented	No	Yes	Unknown	Compensation	N/A	27,500.00
[2010] FWA 5121	0.167	Lawyer	Lawyer	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 5121	0.167	Lawyer	Lawyer	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 5121	0.167	Lawyer	Lawyer	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 5121	0.167	Lawyer	Lawyer	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 5121	0.167	Lawyer	Lawyer	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 5121	0.167	Lawyer	Lawyer	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 5144	1	Self-represented	Self-represented	N/A	Yes	No	Compensation	N/A	3,848.00
[2010] FWA 5146	1	Union	Union	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 5147	2	Self-represented	Union	N/A	No	Yes	None	N/A	N/A
[2010] FWA 5149	1	Lawyer	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 5150	1	Self-represented	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 5156	4	Lawyer	Lawyer	N/A	No	Unknown	None	N/A	N/A
[2010] FWA 5164	0.5	Lawyer	IR Consultant	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 5164	0.5	Lawyer	IR Consultant	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 5174	1	Lawyer	Self-represented	N/A	No	Unknown	None	N/A	N/A
[2010] FWA 5178	1	Self-represented	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 5188	1	Self-represented	Self-represented	N/A	No	Unknown	None	N/A	N/A
[2010] FWA 5247	1	Self-represented	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 5263	1	Self-represented	Self-represented	No	Yes	Unknown	Compensation	N/A	3,702.95
[2010] FWA 5357	1	Self-represented	Union	N/A	No	Unknown	None	N/A	N/A
[2010] FWA 5374	0	N/A	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 5385	0	N/A	Self-represented	Yes	N/A	Unknown	None	N/A	N/A

Citation	Hearing days	Employer represented	Employee represented	Jurisdictional challenge successful	Dismissal held to be unfair	Reinstatement requested	Remedy	Amount backpay	Amount compensation
[2010] FWA 5393	1	Self-represented	Union	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 5395	2	Self-represented	Self-represented	N/A	No	Unknown	None	N/A	N/A
[2010] FWA 5472	2	Union	Lawyer	N/A	Yes	Yes	Compensation	N/A	Unknown
[2010] FWA 5509	1	Self-represented	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 5515	1	Self-represented	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 5563	1	Lawyer	N/A	N/A	N/A	Unknown	None	N/A	N/A
[2010] FWA 5577	1	N/A	Self-represented	N/A	Yes	Unknown	Compensation	N/A	16,294.72
[2010] FWA 5659	1	Self-represented	Self-represented	No	Yes	Unknown	Compensation	N/A	2,478.00
[2010] FWA 5676	1	Self-represented	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 5713	2	Lawyer	Union	N/A	Yes	No	Compensation	N/A	Unknown
[2010] FWA 5753	2	Self-represented	Self-represented	No	Yes	No	Compensation	N/A	25,500.00
[2010] FWA 5767	2	Lawyer	Lawyer	N/A	Yes	No	Compensation	N/A	7,500.00
[2010] FWA 5772	1	Union	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 5780	1	Lawyer	Union	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 5795	1	Union	Self-represented	N/A	No	Unknown	None	N/A	N/A
[2010] FWA 5823	1	Self-represented	Lawyer	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 5850	1	Lawyer	Lawyer	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 5882	1	N/A	Self-represented	N/A	Yes	No	Compensation	N/A	18,173.10
[2010] FWA 5897	2	Lawyer	Lawyer	No	Yes	Yes	Compensation	N/A	25,050.00
[2010] FWA 5985	1	Lawyer	N/A		N/A	Unknown	None	N/A	N/A
[2010] FWA 6025	1	Lawyer	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 6111	1	Unknown	Unknown	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 6116	3	Self-represented	Union	No	Yes	No	Compensation	N/A	Unknown
[2010] FWA 6124	2	Union	Self-represented	N/A	No	Yes	None	N/A	N/A

Citation	Hearing days	Employer represented	Employee represented	Jurisdictional challenge successful	Dismissal held to be unfair	Reinstatement requested	Remedy	Amount backpay	Amount compensation
[2010] FWA 6125	1	Self-represented	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 6129	0	N/A	N/A	N/A	N/A	Unknown	None	N/A	N/A
[2010] FWA 6187	1	Lawyer	Unknown	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 6205	2	Lawyer	Lawyer	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 6209	0	N/A	N/A	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 6211	1	Union	Lawyer	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 6227	1	Self-represented	Self-represented	N/A	No	No	None	N/A	N/A
[2010] FWA 6237	1	Lawyer	Lawyer	N/A	No	Yes	None	N/A	N/A
[2010] FWA 6267	1	Self-represented	Self-represented	N/A	Yes	No	Compensation	N/A	4,000.00
[2010] FWA 6280	1	Self-represented	Unknown	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 6297	6	Lawyer	Lawyer	N/A	Yes	Unknown	Compensation	N/A	18,225.00
[2010] FWA 6340	1	Lawyer	Unknown	N/A	No	Unknown	None	N/A	N/A
[2010] FWA 6392	2	Lawyer	Self-represented	N/A	No	Unknown	None	N/A	N/A
[2010] FWA 6431	4	Lawyer	Self-represented	N/A	No	Unknown	None	N/A	N/A
[2010] FWA 6452	1	Union	Self-represented	No	Yes	No	Compensation	N/A	Unknown
[2010] FWA 6454	4	Lawyer	Union	N/A	Yes	Yes	Reinstatement	Unknown	N/A
[2010] FWA 6487	1	Lawyer	Self-represented	N/A	Yes	No	Compensation	N/A	15,000.00
[2010] FWA 6487	1	Lawyer	Self-represented	No	Yes	No	Compensation	N/A	18,000.00
[2010] FWA 6503	1	Self-represented	Lawyer	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 6593	2	Union	Self-represented	N/A	No	Unknown	None	N/A	N/A
[2010] FWA 6626	1	Self-represented	Union	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 6723	1	Lawyer	Self-represented	N/A	Yes	No	Compensation	N/A	3,000.00
[2010] FWA 6732	2	Lawyer	Union	N/A	Yes	No	Compensation	N/A	21,000.00
[2010] FWA 6733	2	Self-represented	Self-represented	N/A	Yes	No	Compensation	N/A	14,400.00
[2010] FWA 6739	3	Lawyer	Self-represented	N/A	No	Unknown	None	N/A	N/A

Citation	Hearing days	Employer represented	Employee represented	Jurisdictional challenge successful	Dismissal held to be unfair	Reinstatement requested	Remedy	Amount backpay	Amount compensation
[2010] FWA 6905	2	Union	Self-represented	N/A	Yes	Unknown	Compensation	N/A	2,075.00
[2010] FWA 6930	3	Lawyer	Union	N/A	No	Unknown	None	N/A	N/A
[2010] FWA 6948	1	Union	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 6959	3	Lawyer	Lawyer	N/A	Yes	Yes	Reinstatement	Unknown	N/A
[2010] FWA 6994	4	Lawyer	Union	N/A	No	Unknown	None	N/A	N/A
[2010] FWA 7003	2	Lawyer	Union	N/A	No	Unknown	None	N/A	N/A
[2010] FWA 7059	0	N/A	N/A	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 7069	2	Union	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 7129	2	Lawyer	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 7186	1	Unknown	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 7227	0	N/A	N/A	N/A	N/A	Unknown	None	N/A	N/A
[2010] FWA 7283	0	N/A	N/A	N/A	N/A	Unknown	None	N/A	N/A
[2010] FWA 7321	2	Lawyer	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 7324	1	N/A	N/A	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 7356	2	Lawyer	Lawyer	N/A	No	Yes	None	N/A	N/A
[2010] FWA 7367	1	IR Consultant	Self-represented	N/A	Yes	Yes	Compensation	N/A	4,800.00
[2010] FWA 7385	2	Self-represented	Self-represented	No	Yes	Unknown	Compensation	N/A	4,500.00
[2010] FWA 7398	1	Self-represented	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 7410	2	Lawyer	Lawyer	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 7423	2	Lawyer	Self-represented	N/A	N/A	Unknown	None	N/A	N/A
[2010] FWA 7426	1	Lawyer	Self-represented	N/A	No	Unknown	None	N/A	N/A
[2010] FWA 7445	2	Lawyer	Unknown	N/A	No	Unknown	None	N/A	N/A
[2010] FWA 7448	4	Self-represented	Self-represented	N/A	Yes	Yes	Compensation	N/A	6,538.00
[2010] FWA 7507	2	Self-represented	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 7512	1	Self-represented	Self-represented	N/A	Yes	No	Compensation	N/A	2,538.00

Citation	Hearing days	Employer represented	Employee represented	Jurisdictional challenge successful	Dismissal held to be unfair	Reinstatement requested	Remedy	Amount backpay	Amount compensation
[2010] FWA 7555	1	Self-represented	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 7652	1	Self-represented	Self-represented	N/A	No	Unknown	None	N/A	N/A
[2010] FWA 7704	2	Lawyer	Lawyer	N/A	Yes	No	Compensation	N/A	10,670.40
[2010] FWA 7740	1	Lawyer	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 7777	2	Lawyer	Lawyer	No	Yes	Unknown	Compensation	N/A	6,924.00
[2010] FWA 7799	3	IR Consultant	Union	N/A	No	Unknown	None	N/A	N/A
[2010] FWA 7804	2	Self-represented	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 7822	2	Lawyer	Union	N/A	No	Unknown	None	N/A	N/A
[2010] FWA 7845	2	Unknown	Unknown	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 7846	2	Lawyer	Lawyer	No	Yes	No	Compensation	N/A	21,264.00
[2010] FWA 7860	1	Lawyer	Lawyer	N/A	No	Unknown	None	N/A	N/A
[2010] FWA 7872	1	Self-represented	Union	N/A		Unknown	Compensation	N/A	2,406.79
[2010] FWA 7891	2	Lawyer	Lawyer	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 7913	0	N/A	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 7924	1	Union	Union	N/A	Yes	No	Compensation	N/A	8,840.00
[2010] FWA 7926	4	Union	Union	N/A	No	Yes	None	N/A	N/A
[2010] FWA 7978	0.5	Self-represented	IR Consultant	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 7978	0.5	Self-represented	IR Consultant	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 8006	1	Lawyer	Self-represented	Yes	No	Unknown	None	N/A	N/A
[2010] FWA 8011	3	Lawyer	Union	N/A	No	Unknown	None	N/A	N/A
[2010] FWA 8011	3	Lawyer	Union	N/A	No	Unknown	None	N/A	N/A
[2010] FWA 8062	5	Lawyer	Union	N/A	Yes	Yes	Reinstatement	Unknown	N/A
[2010] FWA 8071	1	Lawyer	Self-represented	N/A	Yes	No	Compensation	N/A	Unknown
[2010] FWA 8121	1	Lawyer	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 8144	1	Union	Self-represented	N/A	No	Yes	None	N/A	N/A
[2010] FWA 8172	1	Self-represented	Self-represented	N/A	No	Unknown	None	N/A	N/A

Citation	Hearing days	Employer represented	Employee represented	Jurisdictional challenge successful	Dismissal held to be unfair	Reinstatement requested	Remedy	Amount backpay	Amount compensation
[2010] FWA 8181	1	Self-represented	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 8192	2	Lawyer	Union	N/A	Yes	Yes	Compensation	N/A	13,844.37
[2010] FWA 8230	4	Lawyer	Union	No	Yes	No	Compensation	N/A	25,600.00
[2010] FWA 8332	0	N/A	N/A	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 8351	1	Lawyer	Lawyer	N/A	Yes	No	Compensation	N/A	4,409.08
[2010] FWA 8366	3	Self-represented	Lawyer	N/A	Yes	Yes	Compensation	N/A	Unknown
[2010] FWA 8386	3	Lawyer	Lawyer	N/A	No	Unknown	None	N/A	N/A
[2010] FWA 8436	2	Lawyer	Union	N/A	No	Yes	None	N/A	N/A
[2010] FWA 8462	3	Lawyer	Lawyer	N/A	Yes	No	Compensation	N/A	5,100.00
[2010] FWA 8497	1	Self-represented	Self-represented	Yes	N/A	No	None	N/A	N/A
[2010] FWA 8602	0	N/A	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 8610	1	Lawyer	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 8629	1	Self-represented	Self-represented	N/A	Yes	Unknown	Compensation	N/A	19,168.75
[2010] FWA 8631	2	Lawyer	Union	N/A	No	Unknown	None	N/A	N/A
[2010] FWA 8648	1	Self-represented	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 8663	1	Self-represented	Self-represented	N/A	Yes	No	Compensation	N/A	6,375.15
[2010] FWA 8671	1	Self-represented	N/A	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 8682	1	Union	Union	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 8727	4	Lawyer	Union	N/A	No	Yes	None	N/A	N/A
[2010] FWA 8770	2	Lawyer	Lawyer	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 8784	2	Lawyer	IR Consultant	N/A	No	Unknown	None	N/A	N/A
[2010] FWA 8789	1	Union	Self-represented	No	No	Yes	None	N/A	N/A
[2010] FWA 8790	2	Self-represented	Self-represented	N/A	Yes	No	Compensation	N/A	14,656.00
[2010] FWA 8795	0	N/A	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 8796	1	Self-represented	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 8797	3	Lawyer	Union	N/A	Yes	Yes	Reinstatement	Unknown	N/A
[2010] FWA 8802	0	N/A	N/A	N/A	N/A	Unknown	None	N/A	N/A

Citation	Hearing days	Employer represented	Employee represented	Jurisdictional challenge successful	Dismissal held to be unfair	Reinstatement requested	Remedy	Amount backpay	Amount compensation
[2010] FWA 8838	2	Unknown	Self-represented	N/A	Yes	No	Compensation	N/A	23,853.21
[2010] FWA 8863	1	Self-represented	IR Consultant	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 8884	1	Self-represented	Self-represented	N/A	Yes	Unknown	Compensation	N/A	Unknown
[2010] FWA 8891	1	N/A	IR Consultant	N/A	Yes	Yes	Reinstatement	8,214.02	N/A
[2010] FWA 8895	1	Self-represented	Lawyer	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 8896	2	Lawyer	Lawyer	No	Yes	No	Compensation	N/A	6,156.00
[2010] FWA 8914	1	Unknown	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 8914	1	Unknown	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 8928	0	N/A	N/A	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 8930	5	Lawyer	Lawyer	N/A	No	Unknown	None	N/A	N/A
[2010] FWA 8951	1	Lawyer	Lawyer	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 8954	4	Lawyer	Union	N/A	No	Unknown	None	N/A	N/A
[2010] FWA 8985	1	Lawyer	Lawyer	N/A	No	Unknown	None	N/A	N/A
[2010] FWA 9033	1	Union	Union	N/A	No	Unknown	None	N/A	N/A
[2010] FWA 9044	1	Self-represented	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 9061	1	Self-represented	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 9100	1	Lawyer	Union	N/A	Yes	Yes	Reinstatement	4,500.00	N/A
[2010] FWA 9104	2	Lawyer	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 9114	2	Self-represented	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 9147	1	Self-represented	Self-represented	N/A	No	Unknown	None	N/A	N/A
[2010] FWA 9159	1	Lawyer	Self-represented	No	Yes	No	Compensation	N/A	Unknown
[2010] FWA 9166	1	IR Consultant	Unknown	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 9167	0	N/A	N/A	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 9168	0	N/A	N/A	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 9191	1	Self-represented	Self-represented	N/A	Yes	No	Compensation	N/A	3,000.00
[2010] FWA 9228	1	Lawyer	Unknown	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 9259	2	Lawyer	Union	Yes	N/A	Unknown	None	N/A	N/A

Citation	Hearing days	Employer represented	Employee represented	Jurisdictional challenge successful	Dismissal held to be unfair	Reinstatement requested	Remedy	Amount backpay	Amount compensation
[2010] FWA 9280	2	Self-represented	Self-represented	N/A	Yes	No	Compensation	N/A	Unknown
[2010] FWA 9291	9	Lawyer	Lawyer	N/A	No	Unknown	None	N/A	N/A
[2010] FWA 9325	6	Lawyer	Union	N/A	No	Unknown	None	N/A	N/A
[2010] FWA 9329	1	Self-represented	Lawyer	Yes	N/A	No	None	N/A	N/A
[2010] FWA 9332	1	Self-represented	Self-represented	N/A	Yes	Unknown	Compensation	N/A	26,000.00
[2010] FWA 9356	2	Self-represented	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 9423	0	N/A	N/A	N/A	N/A	Unknown	None	N/A	N/A
[2010] FWA 9434	4	Self-represented	Lawyer	N/A	No	Unknown	None	N/A	N/A
[2010] FWA 9440	3	Lawyer	Lawyer	N/A	Yes	No	Compensation	N/A	15,000.00
[2010] FWA 9463	1	Lawyer	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 9487	1	N/A	Lawyer	N/A	Yes	No	Compensation	N/A	31,664.36
[2010] FWA 9492	2	Self-represented	Self-represented	N/A	Yes	Unknown	Compensation	N/A	Unknown
[2010] FWA 9498	2	N/A	N/A		N/A	Unknown	None	N/A	N/A
[2010] FWA 9505	1	Self-represented	Self-represented	No	Yes	No	Compensation	N/A	1,764.00
[2010] FWA 9507	2	Lawyer	Self-represented	N/A	No	No	None	N/A	N/A
[2010] FWA 9595	1	Unknown	Unknown	N/A	Yes	Yes	Reinstatement	Unknown	N/A
[2010] FWA 9672	1	Union	Union	N/A	Yes	Yes	Reinstatement	Unknown	N/A
[2010] FWA 9689	1	N/A	N/A		N/A	Unknown	None	N/A	N/A
[2010] FWA 9725	1	Self-represented	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2010] FWA 9729	2	Self-represented	Self-represented	No	Yes	Unknown	Compensation	N/A	Unknown
[2010] FWA 9824	2	Lawyer	Union	N/A	No	Yes	None	N/A	N/A
[2010] FWA 9958	4	Lawyer	Union	N/A	No	Yes	None	N/A	N/A
[2010] FWA 9968	2	Lawyer	Union	Yes	No	Unknown	None	N/A	N/A
[2011] FWA 1013	1	Lawyer	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 1058	2	Lawyer	Lawyer	No	Yes	No	Compensation	N/A	25,821.00
[2011] FWA 1079	1	Self-represented	Unknown	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 111	2	Lawyer	Lawyer	N/A	No	Unknown	None	N/A	N/A

Citation	Hearing days	Employer represented	Employee represented	Jurisdictional challenge successful	Dismissal held to be unfair	Reinstatement requested	Remedy	Amount backpay	Amount compensation
[2011] FWA 1122	1	Lawyer	IR Consultant	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 1139	2	Self-represented	Self-represented	N/A	Yes	No	Compensation	N/A	11,200.00
[2011] FWA 1143	2	Lawyer	Lawyer	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 122	1	Self-represented	Lawyer	N/A	Yes	No	Compensation	N/A	7,514.00
[2011] FWA 1230	1.5	Lawyer	Lawyer	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 1230	1.5	Lawyer	Lawyer	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 1230	1.5	Lawyer	Lawyer	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 1230	1.5	Lawyer	Lawyer	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 1230	1.5	Lawyer	Lawyer	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 1230	1.5	Lawyer	Lawyer	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 1255	1	Lawyer	Lawyer	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 1276	2	Lawyer	Lawyer	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 1300	1	Lawyer	N/A		N/A	Unknown	None	N/A	N/A
[2011] FWA 1335	1	Lawyer	Self-represented	N/A	Yes	No	Compensation	N/A	7,643.70
[2011] FWA 1346	1	Self-represented	Union	N/A	Yes	Yes	Reinstatement	Unknown	N/A
[2011] FWA 1353	2	Self-represented	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 1380	1	Lawyer	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 141	2	Lawyer	Lawyer	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 1425	1	Lawyer	Self-represented	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 1475	4	Self-represented	Union	N/A	Yes	Yes	Reinstatement	18,322.35	N/A
[2011] FWA 1504	4	Lawyer	Lawyer	N/A	Yes	Yes	Compensation	N/A	47,500.00
[2011] FWA 1529	1	Self-represented	Self-represented	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 1531	1	IR Consultant	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 1541	2	Lawyer	Union	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 1569	3	Lawyer	Union	N/A	Yes	Yes	Reinstatement	N/A	N/A
[2011] FWA 1586	3	Lawyer	Lawyer	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 159	1	Self-represented	N/A		N/A	Unknown	None	N/A	N/A
[2011] FWA 1600	1	Self-represented	Union	Yes	N/A	Unknown	None	N/A	N/A

Citation	Hearing days	Employer represented	Employee represented	Jurisdictional challenge successful	Dismissal held to be unfair	Reinstatement requested	Remedy	Amount backpay	Amount compensation
[2011] FWA 161	2	Lawyer	Lawyer	N/A	Yes	Yes	Compensation	N/A	Unknown
[2011] FWA 1626	1	Self-represented	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 1629	1	Lawyer	Self-represented	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 1633	2	Unknown	Self-represented	N/A	Yes	Yes	Compensation	N/A	Unknown
[2011] FWA 1638	2	Lawyer	Union	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 1645	3	Union	Lawyer	N/A	Yes	Unknown	Compensation	N/A	8,113.61
[2011] FWA 1680	2	Self-represented	IR Consultant	No	Yes	No	Compensation	N/A	3,242.54
[2011] FWA 1683	2	Lawyer	Lawyer	N/A	Yes	Yes	Reinstatement	N/A	N/A
[2011] FWA 1699	1	Self-represented	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 1762	1	Self-represented	IR Consultant	N/A	Yes	No	Compensation	N/A	11,830.50
[2011] FWA 1767	1	Lawyer	Lawyer	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 1797	1	Lawyer	Self-represented	N/A	N/A	Unknown	None	N/A	N/A
[2011] FWA 1843	2	Lawyer	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 1849	2	Lawyer	Self-represented	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 1862	1	Self-represented	Self-represented	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 1880	1	Self-represented	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 1888	2	Union	Lawyer	No	N/A	Unknown	None	N/A	N/A
[2011] FWA 1889	1	Self-represented	Self-represented	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 1913	1	Lawyer	Lawyer	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 1928	2	Self-represented	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 1934	2	Lawyer	Lawyer	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 1948	1	Lawyer	Union	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 1948	1	Lawyer	Union	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 1974	1	N/A	N/A	N/A	N/A	Unknown	None	N/A	N/A
[2011] FWA 2012	2	Union	Union	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 2031	2	Union	Self-represented	N/A	Yes	No	Compensation	N/A	Unknown

Citation	Hearing days	Employer represented	Employee represented	Jurisdictional challenge successful	Dismissal held to be unfair	Reinstatement requested	Remedy	Amount backpay	Amount compensation
[2011] FWA 2038	2	Self-represented	Self-represented	No	Yes	Unknown	Compensation	N/A	4,768.00
[2011] FWA 2039	2	Lawyer	Self-represented	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 2113	1	Lawyer	IR Consultant	N/A	Yes	Unknown	Compensation	N/A	Unknown
[2011] FWA 2143	2	N/A	Self-represented	N/A	Yes	Yes	Compensation	N/A	5,000.00
[2011] FWA 2158	1	Lawyer	Self-represented	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 2177	1	Self-represented	Self-represented	N/A	Yes	No	Compensation	N/A	17,603.50
[2011] FWA 2178	1	N/A	N/A	N/A	N/A	Unknown	None	N/A	N/A
[2011] FWA 2189	1	N/A	N/A	N/A	N/A	Unknown	None	N/A	N/A
[2011] FWA 2237	1	Unknown	Unknown	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 227	1	Union	Self-represented	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 228	1	Lawyer	Self-represented	No	No	No	None	N/A	N/A
[2011] FWA 2295	1	Self-represented	Self-represented	N/A	Yes	Unknown	Compensation	N/A	3,300.00
[2011] FWA 2315	0	N/A	N/A	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 2326	0	N/A	N/A	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 2350	2	Lawyer	Lawyer	No	No	Unknown	None	N/A	N/A
[2011] FWA 2362	2	Lawyer	Self-represented	N/A	N/A	Unknown	None	N/A	N/A
[2011] FWA 2377	1	Self-represented	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 2378	1	Self-represented	Self-represented	N/A	Yes	No	Compensation	N/A	4,566.00
[2011] FWA 2396	1	Self-represented	N/A	N/A	N/A	Unknown	None	N/A	N/A
[2011] FWA 2412	1	Self-represented	Lawyer	N/A	Yes	Unknown	Compensation	N/A	Unknown
[2011] FWA 2477	1	Union	Self-represented	N/A	Yes	No	Compensation	N/A	Unknown
[2011] FWA 2501	2	Lawyer	Self-represented	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 2505	2	Lawyer	Self-represented	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 2556	0.5	N/A	Union	N/A	Yes	No	Compensation	N/A	2,992.50

Citation	Hearing days	Employer represented	Employee represented	Jurisdictional challenge successful	Dismissal held to be unfair	Reinstatement requested	Remedy	Amount backpay	Amount compensation
[2011] FWA 2556	0.5	N/A	Union	N/A	Yes	No	Compensation	N/A	2,992.50
[2011] FWA 2576	1	Lawyer	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 26	1	N/A	Self-represented	N/A	Yes	No	Compensation	N/A	Unknown
[2011] FWA 2655	2	Self-represented	Lawyer	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 2661	0	N/A	N/A	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 2665	1	Self-represented	Self-represented	N/A	Yes	No	Compensation	N/A	Unknown
[2011] FWA 2689	2	Lawyer	Self-represented	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 2701	1	Self-represented	Self-represented	N/A	Yes	Unknown	Compensation	N/A	4,599.45
[2011] FWA 2720	1	Self-represented	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 2747	2	Self-represented	Lawyer	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 2796	2	Lawyer	Lawyer	N/A	Yes	No	Compensation	N/A	10,260.00
[2011] FWA 2825	1	N/A	N/A	N/A	N/A	Unknown	None	N/A	N/A
[2011] FWA 2849	1	Lawyer	Self-represented	No	Yes	No	Compensation	N/A	4,800.00
[2011] FWA 2865	0	N/A	Self-represented	N/A	N/A	Unknown	None	N/A	N/A
[2011] FWA 2890	2	Lawyer	Lawyer	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 2915	1	Lawyer	Lawyer	No	Yes	No	Compensation	N/A	13,023.15
[2011] FWA 293	4	Lawyer	Union	N/A	Yes	Yes	Reinstatement	N/A	N/A
[2011] FWA 3002	1	Lawyer	N/A	N/A	N/A	Unknown	None	N/A	N/A
[2011] FWA 306	1	Self-represented	Union	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 3063	1	Self-represented	Lawyer	No	Yes	No	Compensation	N/A	9,992.00
[2011] FWA 3065	2	Lawyer	Self-represented	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 3081	1	Self-represented	Self-represented	No	Yes	No	Compensation	N/A	171.00
[2011] FWA 3091	2.67	Lawyer	Lawyer	N/A	Yes	Unknown	Reinstatement	14,043.84	N/A
[2011] FWA 3091	2.67	Lawyer	Lawyer	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 3091	2.67	Lawyer	Lawyer	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 31	1	Lawyer	N/A	N/A	N/A	Unknown	None	N/A	N/A

Citation	Hearing days	Employer represented	Employee represented	Jurisdictional challenge successful	Dismissal held to be unfair	Reinstatement requested	Remedy	Amount backpay	Amount compensation
[2011] FWA 3100	2	Self-represented	Self-represented	N/A	N/A	Unknown	None	N/A	N/A
[2011] FWA 3121	1	Lawyer	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 317	1	Lawyer	IR Consultant	N/A	Yes	Yes	Reinstatement	Unknown	N/A
[2011] FWA 3193	1	Union	Lawyer	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 3198	1	Self-represented	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 3214	1	N/A	Lawyer	N/A	Yes	No	Compensation	N/A	16,302.00
[2011] FWA 3224	1	Lawyer	IR Consultant	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 328	2	Self-represented	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 3307	2	Union	Union	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 3316	1	Self-represented	Self-represented	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 3323	1	Self-represented	Self-represented	N/A	Yes	No	Compensation	N/A	3,270.00
[2011] FWA 3330	1	Lawyer	Union	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 3335	2	Lawyer	Lawyer	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 336	1	Self-represented	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 3386	1	Lawyer	N/A	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 3407	1	Self-represented	Self-represented	No	Yes	No	Compensation	N/A	Unknown
[2011] FWA 3473	0	N/A	N/A	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 3532	3	Self-represented	Lawyer	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 3541	1	Lawyer	Lawyer	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 3549	5	Lawyer	Lawyer	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 3610	1	Unknown	IR Consultant	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 362	1	Lawyer	Lawyer	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 3636	1	Self-represented	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 3664	1	Self-represented	Self-represented	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 3687	1	Lawyer	Union	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 3698	1	Self-represented	Union	N/A	Yes	No	Compensation	N/A	12,595.94
[2011] FWA 3700	2	Lawyer	Lawyer	No	Yes	No	Compensation	N/A	17,500.00
[2011] FWA 3705	0	N/A	N/A	N/A	N/A	Unknown	None	N/A	N/A

Citation	Hearing days	Employer represented	Employee represented	Jurisdictional challenge successful	Dismissal held to be unfair	Reinstatement requested	Remedy	Amount backpay	Amount compensation
[2011] FWA 3711	0	N/A	N/A	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 3713	3	Self-represented	Lawyer	No	No	No	None	N/A	N/A
[2011] FWA 3717	8	Lawyer	Lawyer	N/A	Yes	Yes	Reinstatement	Unknown	N/A
[2011] FWA 3763	1	Lawyer	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 3772	1	Self-represented	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 3778	1	Lawyer	Lawyer	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 3815	0.5	Lawyer	Lawyer	N/A	Yes	No	Compensation	N/A	1,050.00
[2011] FWA 3815	0.5	Lawyer	Lawyer	N/A	Yes	No	Compensation	N/A	2,500.00
[2011] FWA 3857	0.5	Lawyer	Lawyer	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 3857	0.5	Lawyer	Lawyer	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 3907	1	Lawyer	N/A	N/A	N/A	Unknown	None	N/A	N/A
[2011] FWA 3922	2	Self-represented	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 3939	1	Self-represented	Self-represented	N/A	Yes	No	Compensation	N/A	4,295.20
[2011] FWA 3944	1	Union	N/A	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 3987	1	Self-represented	N/A	N/A	N/A	Unknown	None	N/A	N/A
[2011] FWA 4024	2	Lawyer	Self-represented	N/A	Yes	No	Compensation	N/A	12,732.00
[2011] FWA 413	3	Lawyer	Lawyer	N/A	Yes	Yes	Reinstatement	17,493.75	N/A
[2011] FWA 414	1	Self-represented	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 478	1	Self-represented	Self-represented	No	Yes	Unknown	Compensation	N/A	35,000.00
[2011] FWA 534	1	Self-represented	Lawyer	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 538	0	N/A	N/A	N/A	N/A	Unknown	None	N/A	N/A
[2011] FWA 570	2	N/A	Self-represented	N/A	Yes	No	Compensation	N/A	5,120.00
[2011] FWA 575	2	Lawyer	Self-represented	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 600	1	Self-represented	Self-represented	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 61	1	N/A	N/A	N/A	N/A	Unknown	None	N/A	N/A
[2011] FWA 611	1	Self-represented	Self-represented	Yes	N/A	Unknown	None	N/A	N/A

Citation	Hearing days	Employer represented	Employee represented	Jurisdictional challenge successful	Dismissal held to be unfair	Reinstatement requested	Remedy	Amount backpay	Amount compensation
[2011] FWA 617	1	Lawyer	Self-represented	N/A	No	Yes	None	N/A	N/A
[2011] FWA 622	1	Lawyer	N/A	N/A	N/A	Unknown	None	N/A	N/A
[2011] FWA 673	1	Self-represented	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 694	1	Union	Union	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 7	1	IR Consultant	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 750	3	Unknown	Unknown	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 776	2	Self-represented	IR Consultant	No	Yes	No	Compensation	N/A	9,480.00
[2011] FWA 788	1	Lawyer	Self-represented	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 845	1	Lawyer	Self-represented	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 849	2	Lawyer	Lawyer	N/A	Yes	Yes	Compensation	N/A	3,500.00
[2011] FWA 877	1	N/A	N/A	N/A	N/A	Unknown	None	N/A	N/A
[2011] FWA 88	3	Self-represented	Self-represented	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 892	2	Lawyer	Union	N/A	No	Unknown	None	N/A	N/A
[2011] FWA 899	1	N/A	N/A	N/A	N/A	Unknown	None	N/A	N/A
[2011] FWA 960	2	Union	Union	N/A	Yes	Yes	Reinstatement	Unknown	N/A
[2011] FWA 967	1	Lawyer	Self-represented	Yes	N/A	Unknown	None	N/A	N/A
[2011] FWA 977	3	Self-represented	Self-represented	No	Yes	No	Compensation	N/A	7,032.72