JOB SECURITY AND THE THEORETICAL BASIS OF THE EMPLOYMENT RELATIONSHIP

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ABSTRACT

Despite extensive statutory regulation in the form of the Fair Work Act 2009 *(Cth), the employment relationship in Australia is still founded on the contract of employment. It thus privileges the terms of the contract and the 'bargain' struck by employer and employee. It is argued, based on insights from the law and legal theory of contract, property, equity and other areas of private law, that this approach is inadequate. The normative authority of contract derives from the assumption that contractual obligations are voluntarily incurred, but this assumption cannot be maintained in light of the vast differences in bargaining power between employer and employee in most cases. It is argued that, to provide a general law basis for job security, the general law should develop principles based on a recognition of the vulnerability of employees. Such principles would be broadly analogous to property rights and, in particular, Joseph Singer's theory of the 'reliance interest' in property.*

I INTRODUCTION

Under the traditional free market view of the employment relationship, the rights and obligations of employers and employees should be defined primarily by contract. In a contractual framework, it is argued that if the employees wish to bargain for greater rights, they are free to do so within their contract. Contract law's characterisation of the employment relationship, which leads to the obligations of the employer being primarily governed by contractual obligations, does not give full recognition to the inequality that exists between the bargaining parties to the employment relationship, or the vulnerability or dependence of the employee. The framework of contract law is inadequate for protecting the vital interest of job security. The framework of property law provides a more promising approach.

In most developed nations, employers do not have the absolute or unfettered power to manage their enterprises. In Australia, for example, the *Fair Work Act 2009* (Cth) ('*Fair*

Work Act') imposes various constraints on managerial prerogatives, including minimum notice periods in s 117, consultation requirements for redundancy under s 139(1)(j) and unfair dismissal protection in pt 3-2. However, statutory rules are overlaid on the common law basis of the employment relationship — the contract of employment. Statute modifies and alters that common law basis, but it does not displace it. It thus remains a relevant question whether the general law principles that govern the employment relationship are up to the task.

Although this article discusses the right to work and potential means of providing that right a doctrinal basis in the Anglo-Australian common law system, it is not strictly concerned with questions surrounding the philosophical foundations of the right to work, or whether the right to work is a human right.[1] Such questions will need to be bracketed for the purposes of this article, which will instead focus on justifying the position that employees ought to have non-contractual workplace rights at all, and on discussing and critiquing the general reluctance of the common law to recognize such rights.

II STATUTE AND THE COMMON LAW EMPLOYMENT RELATIONSHIP

Much of this article focuses on the common law contract of employment. Much of this article's critique of the existing legal state of affairs is based on the common law's failure to recognize particular features of the employment relationship, such as the tendency for such relationships to be characterized by bargaining power imbalances. Given the extensive statutory regime for regulating the employment relationship — the *Fair Work Act* and various state industrial relations statutes[2] — the law surrounding the contract of employment may seem to have a diminished significance. The *Fair Work Act* contains statutory protections for workers, such as the National Employment Standards (provided for by pt 2-2 of the *Fair Work Act*), which cannot be displaced.[3] It might be thought that most employment disputes take place within the framework of, and are resolved by reference to, this statutory scheme, and so the common law contract of employment is no longer an important object of study.

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[1] See generally Virginia Mantouvalou, *The Right to Work: Legal and Philosophical Perspectives*, (2014) Oxford, Hart Publishing; Virginia Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3 *European Labour Law Journal* 151.

[2] *Industrial Relations Act 1996* (NSW); *Industrial Relations Act 1999* (Qld); *Fair Work Act 1994* (SA); *Industrial Relations Act 1979* (WA); *Industrial Relations Act 1984* (Tas).

[3] *Fair Work Act* s 61. See also the modern awards system established by pt 2-3.

Such a view would be misconceived. First, the statutory law of employment is overlaid on the employment contract, and many aspects of the employment relationship are not regulated by statute. Those aspects are subject to the employment contract. Employers and employees retain substantial latitude in negotiating the terms of their employment contracts. For the most part, the statutory scheme leaves it to the parties to establish the terms of their relationship, intervening only in limited areas such as the conditions provided for by the National Employment Standards and modern awards, and at the state level in occupational health and safety.[4] For example, a contract can provide for situations in which the employer may terminate the employee, as long as it is not inconsistent with the unfair dismissal or adverse action general protections in pts 3-1 and 3-2 of the *Fair Work Act*.

Second, many workers fall outside the various statutory protections.[5] Not all workers are protected from unfair dismissal under s 382 of the *Fair Work Act*, as they may not meet the minimum employment period (one year for small business employers and six months for other employers) (s 382(a)), they may not be covered by a modern award or enterprise agreement (s 382(b)(i)–(ii)), and their earnings might be over the high income threshold (s 382(b)(iii)). Such employees would be more dependent on common law rights.

Third, as will be discussed in greater detail in Part V.B of this article, the common law governing the employment relationship is worthy of study because common law is more amenable to developing into a genuinely coherent body of principle than legislation. Legislation tends to be the product of political compromise between competing goals and interest groups; as such, it often cannot result in the development of a coherent body of principle,[6] especially in the context of a politically charged area of law such as labour law. On the other hand, adjudicative institutions such as courts proceed on a case-by-case basis and are 'accountable to principles which are intrinsic in the prior adjudicative practice'.[7] Unlike the political accountability of legislatures, this kind of accountability is more likely to produce a coherent body of principle. It is for this reason that much of this article focuses on

[4] *Occupational Health and Safety Act 2000* (NSW); *Work Health and Safety Act 2011* (Qld); *Work Health and Safety Act 2012* (SA); *Occupational Health and Safety Act 1984* (WA); *Occupational Health and Safety Act 2004* (Vic); *Work Health and Safety Act 2012* (Tas).

[5] The authors are grateful to one of the referees for suggesting this point.

[6] See Ross Grantham and Darryn Jensen, 'Coherence in the Age of Statutes' (2016) 42 *Monash University Law Review* 360, 369, citing Stephen McLeish, 'Challenges to the Survival of the Common Law' (2014) 38 *Melbourne University Law Review* 818, 831.

[7] Grantham and Jensen, above n 6, 369.

identifying inconsistencies between the operation of common law doctrines and concepts in the context of employment compared to other contexts.

For this reason, it is also insufficient to point to statute as a 'counterveiling force' to the common law's failure to recognize bargaining power imbalances inherent in the employment relationship, to use Kahn-Freund's famous phrase.[8] There is no reason why common law principles are necessarily unable to counterbalance the fact that many employees are at an inherent bargaining power disadvantage to employers, and due to the shortcomings of legislation, it is not entirely satisfactory to leave it to Parliament alone to redress bargaining power imbalances.

Nor is it sufficient to point out, as Howe does, that the objective of labour law in Australia has shifted from securing collective industrial peace to individualised industrial justice.[9] Even assuming a general political consensus that workplace rights ought to be protected, the conception of industrial justice embodied by labour law legislation will necessarily be the result of political compromise in the manner described above. Further, legislation aimed at industrial justice will necessarily require adjudicative bodies to apply discretionary legislative criteria (such as the 'harsh, unjust or unreasonable' criteria in *Fair Work Act* s 385). Such criteria, though discretionary, must still be guided by principle.[10] If the common law is unable to develop a set of principles more sophisticated than the priority of freedom of contract and the managerial prerogative above all, then adjudicative bodies will have fewer legitimate resources to draw on in exercising their discretion, given that modern labour law legislation clearly does not favour freedom of contract and the managerial prerogative to the same extent as the common law of contract.

For these reasons, it would be unfortunate if courts and other adjudicative bodies were to completely abandon the common law as a means for securing industrial justice. Common law principles applicable to the employment relationship should not be left behind in the societal shift towards the recognition of industrial justice and workplace rights. Nor should it be thought impossible for the common law to change tack after so many years of a contract-centric view of the employment relationship: after all, the contract-centric view of the

[8] Otto Kahn-Freund, *Labour and the Law*, (1977) London, Stevens & Sons, 6.
[9] Joanna Howe, *Rethinking Job Security: A Comparative Analysis of Unfair Dismissal Law in the UK, Australia and the USA*, (2016) New York, Routledge, 94–5.
[10] *Norbis v Norbis* (1986) 161 CLR 513, 519 (Mason and Deane JJ).

employment relationship was itself a relatively modern development that replaced the earlier 'master-servant' view of the employment relationship.[11]

III THE FREE MARKET VIEW OF THE EMPLOYMENT RELATIONSHIP

A *The free market*

The traditional contractual approach is associated with the view that people should be 'free to enter the marketplace and structure their own activities free from governmental control and private coercion'.[12] As Singer points out, there is an argument against legal intervention in the area of job security with critics being of the view that it will have a negative impact, not only on the employers, but on the employees it's intended to protect.[13] Critics argue that 'regulation necessarily winds up hurting its intended beneficiaries by depriving them of choices and forcing them to accept arrangements they would not have voluntarily accepted'.[14] Further, by enforcing job security such interference would prevent the free market from 'reallocating resources in an efficient manner'.[15]

Hayek, one of the most eminent advocates for the free market, argued that:

> To seek any 'balance' between interest groups is 'demonstrably irrational and inefficient and unjust in the extreme.' The optimum condition men and women can seek, given the division of labour in industrial society and the nature of human knowledge, is in the nature of things the competitive market.[16]

Further, he argued that:

[11] See generally Mark Irving, *The Contract of Employment*, (2012) Chatswood, LexisNexis Butterworths, 17–35.
[12] Joseph Singer, 'The Reliance Interest in Property' (1988) 40(3) *Stanford Law Review* 611, 646.
[13] Joseph Singer, 'Jobs and Justice: Rethinking the Stakeholder Debate' (1993) 43(3) *University of Toronto Law Journal* 475, 491.
[14] Ibid 477–8.
[15] Ibid 491.
[16] Lord Wedderburn, 'Freedom of Association and Philosophies of Labour Law' (1989) 18(1) *Industrial Law Journal* 1, 13, quoting F A Hayek, *Law, Legislation and Liberty, Vol II: The Mirage of Social Justice*, (1976) Chicago, University of Chicago Press, 96.

> The employee's freedom depends on choice between 'a great number and variety of employers,' and that can be achieved only in a competitive market. The pressure of organised groups such as trade unions on that market creates distortions and must therefore be ended.[17]

This view of the free market leads naturally to a view of private law that leaves little room for obligations that are not voluntarily incurred. As Deakin puts it, Hayek's view is that:

> Private law and the market are mutually supportive elements of a 'spontaneous order' that is both the foundation of a society's well-being and also the necessary condition for the freedom of its individual members. Social legislation, by contrast, interferes with the abstract rules of just conduct in a way that undermines personal autonomy and the well-being of society.[18]

This is the neo-liberal view of the employment relationship, that any limitation on the parties' rights to contract is a 'distortion' of the market. 'The new wisdom is that the relationship between employer and employees is better regulated at enterprise level, by consensual bargain'.[19] This view entails that the obligations arising out of the employment relationship should be contractual obligations only. The scope for protecting job security under this model is highly limited.

The Hayekian view appears to rest on a false assumption. It is wrong to assume that a law of private relations governed by contract alone manages to avoid seeking a 'balance between interest groups'. Contract law does strike a balance between interest groups in at least two unavoidable ways, both imposed by the state: first, in determining what remedies are available for breach of contract (when may a party terminate the contract? Should punitive or restitutionary damages be available, or just compensatory? Should an injunction or specific performance be available?); and second, in determining the rules of evidence and procedure applicable to a breach of contract claim (which, in placing the burden of proof on the plaintiff, favour the defendant).

[17] Wedderburn, above n 16, 9

[18] Simon Deakin, 'Social Rights in a Globalized Economy' in Philip Alston (ed), *Labour Rights as Human Rights*, (2005) Oxford, Oxford University Press, 35, 52.

[19] Joellen Riley, 'Mutual Trust and Good Faith: Can Private Contract Law Guarantee Fair Dealing in the Workplace?' (2003) 16 *Australian Journal of Labour Law* 1, 1.

B *The normativity of contract*

The contractual framework has a natural affinity with the free market view described above. Contractual obligations, so the theory goes, are incurred voluntarily and therefore freely. Bargains and contractual obligations, unlike government regulation, are a natural product of the operation of the free market.

Free market theorists argue that 'contract law has an internal logic and that the logic is normatively attractive'.[20] On this view, the managerial prerogative of the employer takes priority over job security.[21] At the outset, however, it should be observed that it is somewhat anachronistic to view the employment relationship as 'traditionally' governed by the framework of contract law. As French CJ, Bell and Keane JJ pointed out, the employment relationship is significantly older than modern contract law, and it 'attracted incidental obligations' long before the law of contract developed into its modern form: it was only in the 19th and early 20th century that the employment relationship began to be seen as one properly governed primarily by contract law.[22]

This privileging of contractual obligations over all else fits naturally with the English common law's traditional reluctance to interfere with the terms of a contractual bargain in other commercial contexts. In 1875, Sir George Jessel MR held that

> if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice.[23]

As recently as 2010, it was held by the England and Wales High Court that '[i]n a commercial context ... a degree of self-seeking and ruthless behaviour is expected and accepted to a degree'.[24]

The rationale for this view, which reflects 19th century liberal theory, is primarily that contractual obligations are imposed by the will of the parties, and respect for individual

[20] Eric Posner, 'Contract Theory' in William A Edmundson and Martin P Golding (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory*, (2005) Malden, Blackwell, 138.
[21] Ibid 52.
[22] *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169, 182–3 [16] ('*Barker*').
[23] *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462, 465.
[24] *Vercoe v Rutland Fund Management Ltd* [2010] EWHC 424 (Ch) (5 March 2010), [343].

autonomy and choice therefore requires that those obligations be given effect by a court and not disturbed.[25] The emphasis on individual autonomy and choice grew out of a concern with the legitimacy of state intervention — in Morris Cohen's terms, there was a view that 'all restraint is evil and that the government is best which governs least'.[26]

Also used to support the contract view of employment relationships is the argument that adhering to it increases certainty, while imposing obligations external to the agreement of the parties decreases certainty. As Njoya explains, it is generally thought that 'any form of "right" in work that was not granted and defined by the terms of the employment "contract" would impose a vague and unenforceable duty on the employer'.[27]

Both of these considerations — the value placed on voluntary consent to the creation of legal obligations, and the value placed on certainty in commercial dealings — together produced a traditional reluctance on the part of judges to disturb or depart from the bargain arrived at by the parties. Despite the fact that they are considerations which were shaped primarily by reference to commercial contracts between business entities of roughly equal bargaining power, the common law made little exception for the contract of employment.

C *Managerial prerogative*

Additional to the arguments in favour of freedom of contract is the concept of the managerial prerogative, or right to manage, that allows the employer to do whatever they deem necessary for the efficient and economical operation of the enterprise. It is claimed that this 'right to manage derives from the property rights of the owners or stockholders' of the enterprise.[28] Alternatively, Cyril O'Donnell considers the idea that this authority is derived from property rights to be a 'bland assumption' and argues instead that managerial rights are not developed from property rights, but rest 'ultimately in the nature of man'.[29] His reasoning for this argument is that:

[25] See Patrick Atiyah, *The Rise and Fall of Freedom of Contract*, (2003) Oxford, Oxford University Press, 405–8.
[26] Morris Cohen, 'The Basis of Contract' (1933) 46 *Harvard Law Review* 553, 558.
[27]Wanjiru Njoya, *Property in Work: The Employment Relationship in the Anglo-American Firm*, (2007) Farnham, Ashgate Publishing, 26.
[28] Stanley Young, 'The Question of Managerial Prerogatives' (1963) 16(2) *Industrial Labour Relations Review* 240, 241.
[29] Cyril O'Donnell, 'The Source of Managerial Authority' (1952) 67(4) *Political Science Quarterly* 573, 588.

> (1) man as man has natural rights derived from the law of mankind and from the natural law; (2) somehow, man has developed a moral sense; (3) man has always behaved in an organised way and thus submits to laws and the power to enforce them; (4) the tool created for the purpose of developing statute law and confirming natural law is that state; (5) part of the legal system is the law of contract which establishes the right of a manager to command and the duty of the managed to obey; (6) the managed have the power to disobey but the broad penalties of the law generally prove sufficient, along with the natural behavior of man, to achieve obedience; and (7) at the extreme, universal disobedience results in revolution which is succeeded by another legal system embodying status or contract law which is approved by the collective will of the people.[30]

Thus, on O'Donnell's view, the managerial prerogative is closely tied to the contract view of the employment relationship; that is, the managerial prerogative is established by the contract. On this view, the managerial prerogative would seem to derive its legitimacy at least partly from the employee's voluntary acceptance of the prerogative.

As part of this prerogative, 'management needs absolute power to fire or lay off workers as a necessary incentive for the owner's capital to be put to productive use',[31] the idea being that, 'since [workers] are risk averse, they will produce even more than the minimum necessary to hold onto their jobs'.[32]

In Australia, managerial prerogatives have been the subject of much discussion and judicial consideration, particularly in relation to the 'industrial relations' power of the Federal government. Section 51(xxxv) of the Commonwealth Constitution reads:

> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:
>
> (xxxv) conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State …

One issue relating to this power was whether it granted the federal government the power to impose restrictions on the managerial prerogative. It was considered that managerial prerogatives 'posits a class of subjects so central to the efficient organisation, operation and

[30] Ibid 588.
[31] P L Wallis, 'The Protection of Job Security: The Case for Property Rights in One's Job' (1992) 7(4) *Otago Law Review* 640, 645.
[32] Jack M Beermann and Joseph Singer, 'Baseline Questions in Legal Reasoning: The Example of Property in Jobs' (1989) 23 *Georgia Law Review* 911, 926.

commercial viability of business that the right and power to make decisions about them rests (or ought to rest) exclusively with management' and that as such 'this means that such matters fall outside of the ambit of the federal arbitration power'.[33]

An ardent defender of employers' rights to control their enterprises was Barwick CJ, who held in *R v Flight Crew Officers* that:

> Whilst it may be no objection to an award or order settling an industrial dispute or question that the award or order may impinge upon management or the exercise of managerial discretion, management or managerial policy as such is not … a proper subject for an award or order.[34]

IV ISSUES WITH THE CONTRACT VIEW

A *Voluntariness and bargaining power*

As noted above, the normative authority of contractual obligations, and the reluctance of courts to disturb the bargain, derives primarily from the view that those obligations are voluntarily accepted by parties to the contract. Some of the issues of this view are well known. For example, it relies on the assumption that the bargaining power between the parties will be equal. A party's bargaining power is its ability, arising from the costs to the respective parties of failing to reach an agreement, to influence the other party in a negotiation. In *A Schroeder Music Publishing Co Ltd v Macaulay* ('*Macaulay*'), Lord Diplock said: 'To be in a position to adopt [a take it or leave it] attitude towards a party desirous of entering into a contract to obtain goods or services provides a classic instance of superior bargaining power.'[35] Thus it is necessary to consider the consequences, for the employer and the employee, of the employment relationship ending, and whether the employee is in a position to refuse to accept contractual obligations which the employer wishes to impose. As Levine explains:

[33] W B Creighton, W J Ford and R J Mitchell, *Labour Law: Text and Materials*, (1993) Sydney, Law Book Co, 490.
[34] *R v Flight Crew Officers Industrial Tribunal, Ex parte Australian Federation of Air Pilots* (1971) 127 CLR 11, 20.
[35] [1974] 1 WLR 1308, 1316.

> The bargaining power of the parties was believed to be approximately equal. It was assumed that employees could easily find new jobs, while the employer would have no difficulty replacing them. Under these circumstances legal intervention was considered undesirable.[36]

Singer further explains that the free market argument

> assumes that the original distribution of both investment and human capital is sufficiently equal and just to conclude that market participants are able to get what they are willing to pay for. If the existing distribution of economic benefits is not just, then the results of private contracting may reflect, not the voluntary arrangement that maximises the joint interests of both parties, but the imposition of exploitative terms by the more powerful party on the more vulnerable party.[37]

In the context of employment contracts, it is no longer true (and it is unclear if it ever was true) that the parties have equal bargaining power. First and foremost, most people obviously rely on employment to meet their basic physical needs. Increasingly, it is being recognised that employment is also essential to meeting people's psychological needs. As Bromberg J said:

> There is now a greater recognition than ever that employment is important to an employee not simply because it provides economic sustenance. Workplaces are a hub of important human exchanges which are vital to the wellbeing of individual workers. Work provides employees with purpose, dignity, pride, enjoyment, social acceptance and many social connections. As well, the performance of work allows for skill enhancement and advances career opportunities. These non pecuniary attributes of work are important and their denial can be devastating to the legitimate interests of any worker, either skilled or unskilled.[38]

The denial of employment to a person can have serious effects upon their interests. Such effects will generally exceed the effects on an employer of losing an employee, especially when the employer is a larger business and less reliant on any particular individual worker. Industrial development in the late nineteenth century, as Levine explains, meant that 'businesses had grown to such an enormous size that the relative bargaining powers of employee and employer had become grossly unequal'.[39] In the modern world, Lord Steyn has noted 'the progressive deregulation of the labour market, the privatisation of public services,

[36] Philip J Levine, 'Towards a Property Right in Employment' (1972) 22 *Buffalo Law Review* 1081, 1083.
[37] Singer, above n 12, 491.
[38] *Quinn v Overland* [2010] FCA 799, [101].
[39] Levine, above n 36, 1084.

and the globalisation of product and financial markets' as necessitating greater protections for employees.[40]

This situation is further exacerbated in times of economic hardship where unemployment rates are high. Whilst in boon times employees may find it easy to find other work, when times are not so good losing one's job may mean a lengthy period of unemployment. The inequality of power is not only a result of the size and number of potential employers but also of the possible damage that termination can have on a person's reputation. As Blades points out, 'future employment is far more difficult to obtain once the stigma of having been fired is attached'.[41] By contrast, with the exception of negative publicity associated with the unlikely scenario of a mass exodus of employees, the employer does not face the same risk as the employees.

Not only is the assumption of the equality of bargaining power false, but the common law has recognised that some obligations, when imposed on parties with inferior bargaining power, should be set aside as contrary to public policy. This has most famously occurred in the context of restraint of trade clauses and penalties. In Lord Diplock's words:

> in refusing to enforce provisions of a contract whereby one party agrees for the benefit of the other party to exploit or to refrain from exploiting his own earning power, the public policy which the court is implementing is *not some 19th-century economic theory about the benefit to the general public of freedom of trade, but the protection of those whose bargaining power is weak* against being forced by those whose bargaining power is stronger to enter into bargains that are unconscionable.[42]

As Chief Justice Allsop observed, writing extra-curially, this passage recognises that 'the common law has the capacity to develop and mould principles and doctrine that operate upon an assessment of the legitimacy of the exercise of power, the protection of the weak and the restraint of conduct that is unconscionable'.[43]

Collins argues that arguments against freedom of contract that are based on bargaining power are 'overstated'.[44] Different types of employees will face a different level of disadvantage in

[40] *Johnson v Unisys Ltd* [2003] 1 AC 518, 532 [19].
[41] Ibid.
[42] *Macaulay* [1974] 1 WLR 1308, 1315 (emphasis added).
[43] James Allsop, 'Conscience, Fair-Dealing and Commerce — Parliament and the Courts' (Paper presented at the Finn's Law: An Australian Justice conference, Canberra, 25 September 2015), [79].
[44] Hugh Collins, *Justice in Dismissal*, (1992) Oxford, Oxford University Press, 193.

the employment relationship. For example, he argues that highly skilled, senior, or in-demand employees may face a very low level of disadvantage, and employees may generally have an advantage where there is a labour shortage.[45] Further, the employer and employee are vulnerable to each other in different respects. An employer is vulnerable to an employee for the reasons that have traditionally given rise to fiduciary obligations of fidelity and confidence on the part of the employee:[46] the employer typically reposes its legal and practical interests of the employee, often including confidential information. It is not intended to suggest that employees are always, and in all respects, vulnerable or at a disadvantage to their employers. However, a fact of contemporary society is that the majority of employees are, in most respects, in such a position of disadvantage for the reasons listed above.

Imbalances of bargaining power, and the common law doctrines that recognise it, heavily undermine the traditional liberal argument for freedom of contract. The normative basis of enforcing contractual obligations is the voluntary agreement, or consent, of the parties. The quality of that consent is highly questionable in circumstances where the worker does not have a real choice in the imposition of an intolerably onerous contractual term.

Deane J saw a distinction between cases in which the quality of a weaker party's consent was under question, and cases in which the stronger party took unconscientious advantage of a bargain entered into where the weaker party was under a 'special disability' (a concept very similar to imbalances of bargaining power).[47] The former, he said, was the domain of undue influence and duress; the latter the source of equity's jurisdiction to set aside a contract for unconscionable dealing.[48] The distinction is not always strict. In the context of an employment contract, they seem to overlap. The disadvantage in an employee's bargaining position is such as to mean that the employee has no real choice but to accept the employer's terms in entering into a contract of employment, which allows the employer to impose terms which drastically favour the employer. The situation is reminiscent of McHugh JA's description of duress: 'A person who is the subject of duress usually knows only too well what he is doing. But *he chooses to submit to the demand or pressure rather than take an alternative course of action*.'[49] In those circumstances, the weaker party's consent is normatively insignificant notwithstanding the fact that they were fully informed and made

[45] Ibid
[46] See below n 19.
[47] *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447, 474.
[48] Ibid 475.
[49] *Crescendo Management Pty Ltd v Westpac Banking Corp* (1988) 19 NSWLR 40, 45 (emphasis added).

their own choice to enter into the contract. Of course, the law of duress requires the stronger party to exert *illegitimate* pressure,[50] and the potential refusal of employment is not widely recognized as an illegitimate pressure.

Collins further argues that coercion based on economic necessity is not completely analogous to physical coercion, so it is inaccurate to say that employees lack freedom when entering into an employment contract.[51] That is undoubtedly true. However, the argument of this Part does not rest on an analogy with physical coercion or slavery. Rather, it rests on the common law's treatment of other situations in which the quality of a person's consent may be doubtful. Consider, for example, McHugh JA's description of economic duress above. If the common law is willing to intervene in contracts entered into under such conditions, there is an apparent inconsistency in the refusal of the common law to intervene or alter the contractual bargain struck by employer and employee in conditions very similar to those that attract the common law doctrines of duress or unconscionable dealing. This is not to say that employees are necessarily under duress, or that they should always be deemed to be under duress. The point of this observation is simply to note the common law's inconsistent treatment of employment contracts compared to other contracts.

B *Objectivity in the construction of contracts*

The previous section argued that the consent of an employee to onerous contractual obligations may be suspect due to the bargaining power imbalance between the parties. However, the law of contract itself runs counter to the traditional view that contractual obligations are founded entirely on voluntary consent. As Atiyah argues, contractual liability has an objective element because contracts are not interpreted based on the subjective intentions of the parties; rather, they are interpreted according to the 'objective theory' of contract interpretation.[52] The law looks to a reasonable understanding of the terms of the contract. Thus, where a party reasonably relies on a term of a contract, a court will decide in that party's favour even if the other party did not subjectively intend the term to have the meaning determined by the court to be reasonable.

[50] Ibid 46.
[51] Collins, *Justice in Dismissal*, above n 45, 193.
[52] Patrick Atiyah, 'Contracts, Promises and the Law of Obligations' (1978) 94 *Law Quarterly Review* 193.

The effect of the objective theory of contract is demonstrated by courts' willingness to imply terms into contracts, whether ad hoc in the particular circumstances of the contract, or at law for a certain class of contracts. Such terms are implied on the basis that they are 'reasonable and equitable' and necessary to give the contract 'business efficacy'.[53] Some courts have recognised a term implied into all contracts requiring that parties act in good faith in exercising their powers and discharging their obligations under contracts.[54]

Lest it be thought that the objective theory of contract and the doctrine of implied terms are sufficient to remedy all of the difficulties faced by employees, it is important to recall the limitations of those doctrines. In Lord Hoffmann's words, '[i]t is not enough for a court to consider that the implied term expresses what it would have been reasonable for the parties to agree to. It must be satisfied that it is what the contract actually means'.[55] Thus the High Court of Australia held that Australian employers do not owe a duty, arising from an implied term of employment contracts, to maintain trust and confidence in the employment relationship.[56] This illustrates the limits of the objective theory of contract. Even though contracts are interpreted objectively, it is still the actual text of a contract that is to be interpreted, and an employer in a superior bargaining position will often be able to ensure that the text does not give rise to implied obligations that afford too much protection to the employee, or that undermine the managerial prerogative to too great an extent. Terms implied at common law can, after all, be excluded by the express terms of the contract,[57] confirming that the theoretical basis of contractual obligations remains some conception of voluntary agreement.

C *The flawed foundations of the managerial prerogative*

From the foregoing discussion of the normativity of contractual obligations, some of the issues with the concept of the managerial prerogative should be clear. If the prerogative comes from the law of contract, it must come from the voluntary agreement of both the employer and employee. As the previous section argued, however, the description of an employee's agreement to onerous terms in an employment contract as 'voluntary' is suspect. Even aside from that argument, 'many rights which management perceives to be part of its

[53] *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 180 CLR 266, 283.
[54] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234.
[55] *Attorney-General (Belize) v Belize Telecom Ltd* [2009] 1 WLR 1988, 1994 [22].
[56] *Barker v Commonwealth Bank of Australia* (2014) 253 CLR 169.
[57] See, eg ibid 186 [21].

inherent prerogatives have little foundation in law' and simply exist due to the fact that employers and managers have mistaken what they have been able to do as a result of superior economic power as a legal right.[58] Singer challenges the assumed right to managerial prerogative, arguing that:

> Prevalent baselines make managerial power seem natural and inevitable while job security appears to be a meddlesome interference in the free market; rather than a correctable social problem, workers' insecurity is seen as a necessary cost of progress and freedom.[59]

According to Singer, in looking at the employment relationship courts use assumptions that are not necessarily true.[60] One such assumption is that 'management needs absolute power to fire employees as a necessary incentive for owners of capital to put it to good use'.[61] This assumption resembles the justification of implied terms in contract — that the terms are necessary to give the arrangement business efficacy. In response to this, Singer argues that whilst owners of capital desire complete managerial control, 'it may also be true that workers need security to develop their labor'.[62] Put another way, the basis for 'implying' the managerial prerogative into the employment contract privileges the interests of the employer over the employee. Contract law cannot, by itself, justify elevating the interests of the employer over the employee.

'The greater the insecurity of tenure, the harder the employee will work to maintain his or her job'.[63] Those who oppose the concept of job security rely on the restrictive effect it may have on employers and the financial burden it imposes. However, this is an empirical premise and cannot simply be asserted without empirical evidence. The opposite may in fact be true. Singer points out that it is 'increasingly apparent that one reason US businesses are not doing as well in international competition as they could is that they fail to utilize their workforce effectively'. He argues that the 'refusal to workers of job security deprives them of incentives to increase productivity'.[64] In other words, '[w]orkers whose jobs are secure might work harder because they feel more positive about their jobs'.[65] Wallis echoes this idea by stating

[58] Young, above n 28.
[59] Beermann and Singer, above n 32, 919
[60] Ibid 925.
[61] Ibid.
[62] Ibid 927.
[63] Wallis, above n 31, 645.
[64] Singer, above n 12, 509.
[65] Beermann and Singer, above n 32, 927.

that 'if an employee believes that he or she will not lose his or her job unjustly, then there is more of an incentive to work well'.[66]

In the Australian context, the primacy once given by some theorists to the managerial prerogative has attracted criticism from judges. Murphy J, in *Federated Clerks*, stated that:

> It appears to assume the existence of an unchanging class of matters which are inherently managerial in character and which, by their very nature, are or ought to be beyond the regulatory powers of government or the 'industrial' claims of employees. In so far as it does this the doctrine if both unconvincing and unhistorical. It is unhistorical because it is so obviously at odds with what has taken place *even* since federation.[67]

Further, in *Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd* it was stated in relation to managerial prerogatives that '[t]here is no basis for making such an implication. It is an implication which is so imprecise as to be incapable of yielding any satisfactory criterion of jurisdiction'.[68] Thus the idea of a managerial prerogative plays no real role in the constitutional concept of arbitral power. It cannot be relied upon to deny legislative protections to workers under legislation based on the conciliation and arbitration power, such as the *Fair Work Act*.

While these statements were made in the context of cases on the extent of the conciliation and arbitration power, the criticism of the managerial prerogative doctrine as 'imprecise' has broader implications. It demonstrates that there is no principled reason for singling out the class of matters which are typically considered part of the managerial prerogative, or for giving the employer absolute discretion with respect to those matters. The traditional justifications for the managerial prerogative fail to distinguish between legitimate and illegitimate forms of pressure or ownership. They simply assume that the power to hire and fire, as part of the managerial prerogative, is a legitimate form of power which employers should be able to exercise over employees, without giving any cogent argument in support of that proposition. The force of the managerial prerogative argument is illusory in that it sidesteps this issue of legitimacy.

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[66] Wallis, above n 31, 647.
[67] *Federated Clerks Union of Australia v Victorian Employers Federation* (1984) 154 CLR 472.
[68] *Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd* (1987) 163 CLR 117, 136.

Some forms of ownership or motivation are plainly legitimate: for example, positive reinforcement and feedback. It is uncontested, however, that certain types of pressures or incentives which employers could theoretically use to motivate employees and increase productivity are illegitimate. Employers are not allowed to physically threaten their employees, or require employees to surrender personal documentation such as passports. Similarly, it is uncontested that an employer's ownership has limits. An employer is not allowed to enslave an employee; that is not a legitimate form of property right. Strictly speaking, it is not even accurate to say that shareholders of a company 'own' the company: they own shares in the total capital stock of the company, but they do not own the legal entity that is the company.[69] There is no legitimate property right that allows one to 'own' a company in the technical legal sense, so it is misleading to speak of 'owners' of companies or enterprises.

The power to fire employees for a particular reason or reasons, while less extreme than the unlawful acts just mentioned, is just another form of pressure directed at motivating employees (according to the managerial prerogative). Certain of those reasons may be legitimate and certain of them may not be. However, classifying the power to fire employees generally as a 'managerial prerogative' is unhelpful because it distracts from the ultimate question of whether it is legitimate for an employer to hold that power. In the following Part, it will be argued that an unrestricted, unconditional power to fire an employee is not legitimate, and that employees have a corresponding right to job security — that is, a right against being dismissed in a way that is arbitrary, capricious, unfair, etc.

Further, a striking feature of the managerial prerogative is its asymmetry. As Collins argues, considerations of an employee's civil liberties, such as freedom of speech, 'seem to be easily swamped by considerations reflecting respect for the breadth of managerial prerogative'.[70] Traditional justifications for the managerial prerogative fail to explain why the employer's right to manage their business always outweighs any relevant rights of the employee. Collins gives the examples of employees dismissed due to their public statements about the

[69] The separation between a company and its shares is clear when one considers the requirements of transferring or assigning shares. A transfer of a share has been described as a 'a three sided novation rather than a two sided assignment' because '[t]he company is involved in the change of ownership': *Elders Forestry Ltd v Bosi Security Services Ltd* [2010] SASC 223 (21 July 2010), [115], quoting Robert P Austin & Ian M Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 14th ed, 2010), [17.210]. That is, the company is involved in the transfer not because it is a property right in the company that is being transferred, but because the company's *approval* of the transfer (in the form of registration) is required for it to be successful.

[70] Collins, *Justice in Dismissal*, above n 45, 185.

employer's activities in exporting nuclear material, and due to their homosexuality.[71] The core of the problem with the managerial prerogative is that it arbitrarily prioritises the employer's rights over the employee's.

It might be thought that a counterpart of the managerial prerogative, which tempers the harshness of an employer's broad discretion over its employees and business, is the common law relating to duties owed by the employer to employee. Employers owe common law duties to only terminate employment lawfully in accordance with the contract of employment,[72] provide sufficient work to the employee to earn reasonable remuneration where the employee's remuneration is dependent on the amount of work done,[73] take reasonable care of employees' health and safety (including a non-delegable duty to take reasonable care)[74] and indemnify employees for losses sustained and expenses incurred in carrying out the employer's instructions.[75]

At the outset, it should be observed that common law and equity traditionally imposed significantly more onerous duties on *employees*. For example, employees generally owe fiduciary duties towards their employers,[76] but not vice versa. It has been held that in Australia, employers do not owe a duty not to destroy the trust and confidence in the employment relationship,[77] and thus there is no counterpart duty to employees' duties of fidelity[78] to the employer (derived from employees' fiduciary status). Further, the common law duties of employees are all either implied contractual terms or duties arising from tort law. They are, as a result, restricted by the limitations of both doctrines — contractual terms cannot be implied except in the circumstances set out in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council*,[79] and tortious duties primarily relate to the physical and mental health and safety of the employee, without much regard for their economic welfare.[80]

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[71] Ibid 186.
[72] *New South Wales v Paige* (2002) 60 NSWLR 371.
[73] *Turner v Goldsmith* [1891] 1 QB 544.
[74] As an implied contractual term, see *Hamilton v Nuroof (WA) Pty Ltd* (1956) 96 CLR 18; as a non-delegable tortious duty, see *Wilsons v Clyde Coal Co Ltd v English* [1938] AC 57; *Kondis v State Transport Authority* (1984) 154 CLR 672.
[75] *Cleworth v Pickford* (1840) 7 M & W 314; *Burrows v Rhodes* [1899] 1 QB 816.
[76] *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 96–7 (Mason J); *Victoria University of Technology v Wilson* (2004) 60 IPR 392; *Mainland Holdings Ltd v Szady* [2002] NSWSC 699, [66].
[77] *Barker v Commonwealth Bank of Australia* (2014) 253 CLR 169.
[78] See *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66, 81–2 (Dixon and McTiernan JJ).
[79] (1977) 180 CLR 266, 283
[80] Except in the highly limited circumstances where a plaintiff might have a cause of action in negligence arising from pure economic loss: see, eg, *Perre v Apand* (1999) 198 CLR 180.

V RECOGNISING THE VALUE OF JOB SECURITY

A *The importance of work and job security*

In modern society, one's job is often central to one's identity, dignity and self-esteem. A job is important to recognition by others, including by the government and providers of services. Whether applying for a credit card, a home loan or a rental property in which to live, people must provide details of their employment and references from their employers in order to establish their reliability and capacity to pay. Employment status and history have become an essential indicator of not just a person's financial capacity, but also reliability and trustworthiness. It is now more important than ever to protect people from having their employment taken away arbitrarily.

As Reich points out:

> Today more and more of our wealth takes the form of rights or status rather than tangible goods. An individual's profession or occupation is a prime example. To many others, a job with a particular employer is the principle form of wealth. A profession or a job is frequently far more valuable than a house or bank account, for a new house can be bought, and a new bank account created, once a profession or job is secure.[81]

Or in other words, as Tannenbuam put it: 'For our generation, the substance of life is in another man's hands'.[82] Yet, as Collins points out, despite this importance, workers 'enjoy neither secure possession nor absolute control over its alienation'.[83]

The financial as well as emotional costs suffered by an employee as a result of a termination from employment can be high. Of significance are 'the insecurity and fear of redundancy and unemployment' as well as the 'psychic and familial costs' of termination.[84] Singer states that the management argument underestimates the impact of insecurity and termination on employees.[85] When the level of unemployment increases, the possible impact of unemployment also rises due to the decreased prospects of finding further employment.

[81] Charles Reich, 'The New Property' (1964) 73(5) *Yale Law Journal* 733, 738–9.
[82] Frank Tannenbaum, *A Philosophy of Labor*, (1951) New York, Knopf, 9.
[83] Collins, above n 45, 10.
[84] Wallis, above n 31, 647.
[85] Beermann and Singer, above n 32, 930.

Advances in technology further narrow alternative employment options by overtaking jobs once done by hand or requiring increased specialization.[86]

Whilst in certain economic climates employees may have been able to more easily move from one job to another, increasingly this is not the case. The management argument that the ending of an employment relationship has little impact on the employee is based an outdated assumption that 'there are no barriers to the free flow of workers from one job to another'.[87]

Collins also notes that employees generally have non-pecuniary interests in their work. Work may be a source of 'social status and self-esteem', of 'friendships and social engagements', and of 'fulfilling intellectual, artistic, or physical challenges'.[88] The importance of these non-pecuniary interests, and the effect of their denial, would generally outweigh the non-pecuniary detrimental effects to an employer of losing an employee.

At a more fundamental level, and related to Collins' observations, philosophers and labour law theorists have recognized the importance of work to human life. According to Arendt, meaningful work — work done to produce lasting things ('artefacts'), rather than merely to fulfil transient needs — distinguishes humanity from beasts.[89] On an Aristotelian conception of the good life, a person cannot achieve flourishing (*eudaimonia*) unless he or she lives a life of activities involving the proper performance of his or her function as a human being.[90] Wiggins interprets these activities as being 'the *work* … that is proper to a human person'[91] and says that '[t]o have no work to do … is among the very worst things that can befall someone'.[92] The centrality of work to human life means that the possibility of being unable to work should be taken seriously as a factor affecting the bargaining power balance between (prospective) employee and employer.

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[86] Lawrence E Blades, 'Employment at Will vs Individual Freedom: On Limiting the Abusive Exercise of Employer Power' (1967) 67(8) *Columbia Law Review* 1404, 1405.
[87] Beermann and Singer, above n 32, 930.
[88] Hugh Collins, 'The Meaning of Job Security' (1991) 20 *Industrial Law Journal* 227, 235.
[89] JE Penner, 'Aristotle, Arendt and the Gentleman: How the Conception of Remuneration Figures in our Understanding of a Right to Work and Be Paid' in Virginia Mantouvalou, *The Right to Work: Legal and Philosophical Perspectives*, (2014) Oxford, Hart Publishing, 88–9, citing Hannah Arendt, *The Human Condition* (1958) Chicago, University of Chicago Press.
[90] Aristotle, *Nicomachean Ethics*, (W D Ross trans, 2nd ed, 2009) Oxford, Oxford University Press, 11.
[91] David Wiggins, 'Work, its Moral Meaning or Import' in Virginia Mantouvalou, *The Right to Work: Legal and Philosophical Perspectives*, (2014) Oxford, Hart Publishing, 11–12, citing ibid.
[92] Ibid 13–14.

B *Doctrinal bases of the right to work and job security*

The importance of work has led some to recognise it as a right. In the limited context of someone who is actually hired as an employee, Morritt LJ (with whom Robert Walker and Stuart Smith LJJ agreed) said:

> But as social conditions have changed the courts have increasingly recognised the importance to the employee of the work, not just the pay ... Lord Denning MR considered that it was open to a welder to argue that: 'a man has, by reason of an implication in the contract, a right to work. That is, he has a right to have the opportunity of doing his work when it is there to be done'.[93]

This is not a recognition of a general right to work — it still operates within the contractual framework. It is a recognition of an implied term in contracts of employment requiring an employer to give work to the employee. This protection is therefore vulnerable to the issues previously identified with the contract approach to employment.

The limited common law recognition of employees' rights has generally been founded on contractual concepts or concepts otherwise referable to free market ideology. In the UK decision of *Naigle v Feilden* it was stated that 'the common law of England has for centuries recognised that a man has a right to work at a trade or profession without being unjustly excluded from it'.[94] This proposition appears to be primarily directed at preventing 'unjust' restrictions on free trade. In *Allen v Flood*, Hawkins J held that workers have a 'probable expectation' of continued employment:

> The daily labourer, whose tested character for steadiness, honesty, and industry has induced his master, as a matter of course, through a long series of years, week by week to renew or continue his employment finds in this the foundation for his 'reasonable and probable expectation' that he may rely on continual employment in the future.[95]

The *Allen v Flood* idea of a reasonable expectation conferring rights on an employee is purportedly based on the objective theory of contract — the parties are bound by the terms of the contract as reasonably understood and construed. The case is interesting because it demonstrates judicial recognition of the kinds of interests employees have in their jobs, but in protecting that interest, Hawkins J was required to draw a connection to the contractual

[93] *William Hill Organisation Ltd v Tucker* [1999] ICR 291, 298–9 (citations omitted).
[94] *Naigle v Feilden* [1966] 2 QB 633, 644, quoted in Njoya, above n 16, 41.
[95] [1898] AC 1, 16.

framework, a framework in which obligations arise from the voluntary agreement of the parties. Rather than recognising the interests a worker has in their work based on the importance of work to a person's dignity and financial security, Hawkins J instead used implied voluntary agreement as the normative basis for protecting the worker's interests. The case is similar to other 19th century cases in which courts used contract law to remedy civil wrongs,[96] rather than recognising those wrongs as wrongs in themselves. It is reminiscent of the fiction of 'quasi-contract' on which restitutionary claims, such as the claim for money had and received and the claim for quantum meruit, were previously founded. This general approach represents an attempt to pigeonhole various wrongs into the framework of contract.

The inadequacies of this approach are clear. First, it is an obviously circuitous means of protecting interests which deserve protection in their own right. The High Court recognised in *Pavey & Matthews Pty Ltd v Paul*[97] that the idea of a quasi-contract is indeed a fiction, and that the true basis of restitutionary claims is as a means of preventing unjust enrichment.

Second, and relatedly, the fact that an *Allen v Flood*-style protection is based on contract law means that employers can always exploit contractual principles to get around the protection, such as by providing that the worker has no expectation of continued work.

Third, it is simply an unconvincing and strained interpretation of the intentions of the parties. Businesses which regularly transact with each other at arms-length should, on the *Allen v Flood* approach, similarly create in each other a reasonable expectation that their business relationship will continue. Yet the law of contract recognises no implied term 'protecting' parties in an arms-length business relationship from the termination of that relationship in accordance with express provisions of the contract. The reason for this is clear: the relationship being arms-length, the parties are not vulnerable to one another and have no need of an *Allen v Flood*-type protection. However, on a contractual approach in which the notion of intention (objective or not) and voluntarily incurred obligations are decisive, the vulnerability of the parties should not make any difference. Vulnerability is certainly not *explicitly* invoked in *Allen v Flood* itself, but as these arguments should make clear, the vulnerability of employees and their dependence on their employment is the most plausible

[96] See, eg Hugh Collins, *The Law of Contract*, (4th ed, 2003) Cambridge, Cambridge University Press, 4, citing the famous case of *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256. Collins argues that in this case, the court declined to recognise the misleading advertising as a civil wrong in itself, instead using the law of contract to give a remedy for misleading claims.

[97] (1987) 162 CLR 221. See also *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1.

explanation for the rule in *Allen v Flood*. A superior basis for protecting the employee should recognise that the employee's vulnerability and dependence, not some fiction of implicit contractual undertakings, are core to the protection.

If the contractual approach to the employment relationship is done away with or recognised as having serious limitations, what should take its place? One approach to this question is simply to abandon any attempt at fitting the employment relationship into an overarching private law framework like contract. While contract can govern some aspects of the employment relationship, the other rights and obligations arising from the relationship could simply be created by ad hoc, miscellaneous rules contained in statutes, such as the *Fair Work Act*, designed to balance the interests of employer and employee and arrived at by political compromise.

However, it is desirable for legal rules to be grounded in some overarching, coherent framework, rather than merely being the product of political compromise and ad hoc legislation. Contract law is one such framework. Its inadequacies do not negate the attractiveness of its 'internal logic'. Those inadequacies mean that the internal logic cannot be rigorously applied to all aspects of human relationships for reasons already discussed, but the fact that it is based on a fundamental principle and value — the paramountcy of voluntarily incurred obligations — gives it some strength as an overarching principle or framework.

Commentators have recognised a need for the law to be coherent, rather than a 'random assemblage of unrelated and inconsistent rules'.[98] Coherence is closely linked to the rule of law: the principle that 'like cases must be treated alike' can only be adhered to, and the law can only 'speak with one voice', if legal rules are coherent. As Dworkin argues, legislators must make the law coherent and justifiable by a set of general values,[99] whereas judges must act as if legal rules express coherent principles.[100] Coherence is necessary to maintain what Dworkin calls the 'integrity' of the law and to avoid unprincipled outcomes.[101] Weinrib argues that for a body of rules to be coherent, they must be expressions of a single unifying

[98] Grantham and Jensen, above n 6, 363.
[99] Ronald Dworkin, *Law's Empire*, (1986) Cambridge MA, Harvard University Press, 176.
[100] Ibid 217.
[101] Ibid 183.

idea.[102] That idea exists at a higher level of abstraction than directly applicable legal rules.[103] If the contractual framework cannot supply that unifying idea, what can?

C *Singer's reliance interest*

Singer argues that beyond contract there should be a 'reliance interest' in employment which must be protected. In the context of plant closures, he states that:

> the corporation should not be allowed to waste property which has been relied upon by members of the common enterprise; such property is held in trust for the benefit of the common enterprise and especially for the benefit of the more vulnerable parties to the relationship.[104]

Singer justifies this assertion of a 'reliance interest' by reference to a range of other circumstances in which the law 'imposes mutual obligations on persons who enter relationships of mutual dependence'.[105] He provides examples from property law such as adverse possession, prescriptive easement and public rights of access to private property, linkage requirements examples among others, the common thread being that these relationships are protected not because of voluntarily incurred obligations, but 'because the parties have relied on each other generally and on the continuation of their particular kind of relationship'.[106] As such, the law steps in to protect the more vulnerable party.

Singer's reliance interest is based on what he calls the 'social relations view'[107] which emphasises the relationships involved as opposed to the free market view which regards people as autonomous and 'property as either owned or not owned in a system of private property'.[108] He argues that:

> the relation between power and vulnerability should be at the heart of our analysis of property rights. Rather than asking 'who owns the factory?' we should ask 'what relationships should we nurture?' We should encourage people to rely on relationships of mutual dependence by making it possible for

[102] Ernest J Weinrib, 'Legal Formalism: On the Immanent Rationality of Law' (1988) 97 *Yale Law Journal* 949, 976.
[103] Ibid.
[104] Singer, above n 12, 660.
[105] Ibid 664.
[106] Ibid.
[107] Singer, above n 12, 702.
[108] Wallis, above n 31, 652.

> everyone to form such relationships and by protecting those who are most vulnerable when those relationships end.[109]

Singer's reliance interest theory accords well with this article's discussion of the vulnerability and dependence of employees. Rather than trying to create protections for job security out of a fiction based on voluntary undertakings or contractual obligations, he recognises that the true interest to be protected is employees' reliance on and vulnerability to their employers. The reliance interest theory does not suffer from the same issues previously identified with the *Allen v Flood* approach or the now defunct fiction of quasi-contract.

It might seem strange to think of a job as property. Unlike other forms of property, an employee does not and should not have 'sole and despotic dominion'[110] over their job; they do not and should not have the ability to 'do anything they like with' it,[111] to 'use it, use it up, neglect it, destroy it, give it away entirely or for a time, lend it, sell or lease it, pledge it, leave it by will, and so on'.[112] However, as Singer argues, the traditional conception of property rights as totally unfettered is simply false: private property may well come with inherent limits and obligations, and the 'tension' between obligation and unfettered property rights is the 'essence' of property.[113]

Nor should the fact that jobs are intangible rule out treating them as property. As Meyers has said, 'a job, of course, is an abstraction, but like other abstractions such as "good will" and "expectancy of profit," it may become the object of "ownership"'.[114] In principle, there is no barrier to an abstraction, such as a job, being the subject of property. As Munzer explains, '[t]he bundle of rights analysis views property as a package of rights among persons with respect to things'.[115] A job can fit into this analysis as a 'thing' just as well as traditionally recognised forms of property, such as land, goods, and rights to payment.

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[109] Singer, above n 12, 751.
[110] William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765–1769* (first published 1765, 1979 ed) Chicago, University of Chicago Press, vol 2, 2.
[111] F H Lawson and Bernard Rudden, *The Law of Property*, (3rd ed, 2002) Oxford, Clarendon Press, 90.
[112] Ibid.
[113] Joseph William Singer, *Entitlement: The Paradoxes of Property*, (2000) New Haven, Yale University Press, 204.
[114] Frederic Meyers, *Ownership of Jobs: A Comparative Study*, (1964) California, Institute of Industrial Relations, University of California, 3.
[115] Stephen R Munzer, 'The Common and the Anticommons in the Law and Theory of Property' in William A Edmundson and Martin P Golding (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory*, (2005) Malden, Blackwell, 149.

On this view, protections for job security are really a form of vindicating property rights. Adopting the proprietary framework should mark a shift away from the language of 'implied terms', which have thus far been the primary means of protecting employees' rights where statute is silent, and towards more direct recognition of the 'reliance interest' of employees. The contract of employment still has a place in this framework. The employment relationship, with its further reliance-based rights and obligations, is created in the first place by a contract, much like other forms of property (such as easements and estates in fee simple) can be created or transferred by contract. The point of the proprietary approach to employment is not to eradicate the idea of contract from the law of employment; it is to confine it to contexts where contractual principles, with their reliance on the normative authority of voluntary and consensual undertakings, can justly be applied — that is, when the relationship is created in the first place.

VI CONCLUSION

This article has analysed the foundations of the employment relationship. It has argued that the contractual framework used by the common law to allocate rights and obligations in the relationship is inadequate. It has defended the continuing relevance of the common law despite the extensive statutory regulation of the employment relationship — first by noting the desirability of a coherent body of principle as opposed to the result of political compromise, and second by identifying areas where certain statutory protections (such as unfair dismissal and the National Employment Standards) are unavailable.

The vulnerability and dependence of the employee undermine the normative theory behind contractual obligations, which emphasises the protection and enforcement of voluntary undertakings. Instead, the framework of property law and rights created not by consent but by objective features of the relationship (such as the vulnerability and dependence of the employee) provide a more promising basis for the employment relationship.