REDUNDANCY AND THE OPERATION OF AN EMPLOYMENT TERMINATION LAW

C. J. ARUP*

INTRODUCTION

In their review of labour law literature Bob Hepple and William Brown argue that the main concern of future research, at least in Britain, ought to be with legislative intervention and that it should address two interrelated questions: what lies behind the legislation, and how does the legislation function?[1]

The two writers suggested that the following questions be explored when investigating the social causes of labour legislation. Why does the state intervene at all? Why are legal as distinct from other forms of state intervention used? Why does the legislator choose particular forms of industrial behaviour for legal definition and prohibition? Why is one particular type of law agency selected by the legislator?

The second main line of investigation was to be concerned with the question, how does the legislation actually function? How does it affect the rational behaviour of individuals? The concern in this regard may be the extent to which the legislation succeeds in fulfilling its planned objectives. Given the ambiguity in the objectives of much legislation, the interest might be, perhaps more profitably, in the actual impact of the legislation, whether intended or unintended, particularly in terms of the reactions it produces from the industrial parties.

In Britain and in the United States, employment termination legislation has been the subject of scrutiny along these lines. In Australia, following the recommendation of the Committee of Inquiry into Technological Change in Australia,[2] the Australian Council of Trade Unions (A.C.T.U.) has asked the Commonwealth Conciliation and Arbitration Commission (the Commission) to create "a floor of rights" for job protection and compensation through a series of standard awards, commencing with a test case that is currently before the Commission. If the A.C.T.U.'s claims are successful, employees would be protected from "unfair dismissal" — it is assumed this means that an employer would in part need to have

* Christopher J. Arup, B.A., LL.B. (Melb.), LL.M. (Monash), Lecturer, Department of Legal Studies, La Trobe University. I would like to thank Brent Creighton, Stephen Deery and John Willis for their helpful comments on earlier drafts of this article. However, any errors, etc., remain my own.

[1] B. A. Hepple and W. A. Brown, "Tasks for Labour Law Research" (1981) 1 *Legal Studies* 56.

[2] Commonwealth of Australia, Committee of Inquiry into Technological Change in Australia, Technological Change in Australia (A.G.P.S., Canberra, 1980) vol. 1, p. 173.

good cause to dismiss and that one such good cause would be the redundancy of the employee. The awards would also require employers to make all efforts to avoid terminations due to redundancy.[3]

Legal changes are occurring in the state jurisdictions too. The New South Wales Parliament passed legislation late in 1982 that requires employers to give the Industrial Commission warning of dismissals and empowers the Commission to convene a conference to settle matters of termination of employment and order benefits for the dismissed;[4] the Victorian Government has foreshadowed similar legislation requiring notice so that the President of the Industrial Relations Commission may convene a conference to determine whether the redundancies may be avoided or the adverse effects may be minimized.[5] The matters discussed in this article do not stand or fall on the outcome of these particular moves for awards and legislation but it is of course helpful to have some local initiatives to use as one example for general remarks.

This article considers the arguments for and against such laws, including in that consideration an estimation of their likely impact. Hepple and Brown intended their questions to be applied by means of historical studies seeking to explain how existing legislation emerged and operated; the questions can also be pursued where the interest is, as a matter of policy, in the prospects of proposed "legislation".

The paper will proceed from an outline of the competing characterizations of contract law, for the "failure" of contract law is a major source of justification for legislative intervention. The paper will examine the claims made for the legislative protection of jobs, concentrating on the benefits of a right to review the determinations of employers that employees are redundant (to be referred to as a "requirement of good cause"). It will then consider the costs that such a law might create and turn to the record of a similar law that has been in operation in the United Kingdom for the last few years. By this process, the paper endeavours to answer a composite question, what role would a standard employment termination law play? It is hoped that this approach will provide some framework for the treatment of the subject of redundancy law in Australia.

As this prospectus of the paper suggests, conducting a policy analysis means the focus is on the merits of legislative intervention. Nevertheless, the analysis would lack force if it failed to consider the likely responses of the industrial parties, and the tribunals which have the legal competence

[3] On 14th October 1982, a Full Bench of the Commission determined that it had jurisdiction to hear most but not all of the A.C.T.U.'s claims; *Amalgamated Metal Workers' and Shipwrights' Union and ors.* v. *Broken Hill Proprietary Ltd and ors* (1982) 24 A.I.L.R. 487. The claims to protection from unfair dismissal and for efforts to avoid terminations due to redundancy were among those considered valid.

[4] *Employment Protection Act* 1982 (N.S.W.).

[5] *Industrial Relations (Amendment) Bill* 1983 (Vic.). After considerable objection, particularly from the Victorian Chamber of Manufacturers, the opposition parties combined to defeat the relevant provisions of the Bill in the Legislative Council.

to enact the policy, and thus the real prospects of the policy being implemented. It is, therefore, useful to relate the claims made both for and against such a policy to recent trends in employment termination laws here and overseas and to recent developments in the outlooks and strengths of the industrial parties.

CONTRACT LAW

(i) Economic justification

The last two decades have seen a lively illustration and discussion of the Neo-Classical economic approach to law, which is identified most closely with the "Chicago school". This approach has argued a case for contract as the predominant legal form for ordering relations and a corresponding case against legislative intervention and regulation.

Employment and labour relations have constituted a field in which this approach, at least in terms of theorizing about the functions of law, has been applied. The contract of employment forms the underlying legal basis of the individual relationship and the main legal source of expression of collective bargains. Legislation and awards may emerge as a reaction both to the outcomes of individual and collective bargaining and to the manner in which that bargaining is conducted. In Australia, so far as any legal rule is critical to the determination of job tenure, contract of employment law is still the major source. Nearly all awards reinforce the common law right to determine the employment by giving notice to the other party, fixing the period of notice at one week. It is necessary to evaluate this law, both in the terms of the Chicago school and the terms of its opponents, in order to see whether there is support for change in the legal regime.

It is the thesis of the Chigago school that the common law, including the law of the contract of employment, acts to secure the most efficient allocation of labour resources. The doctrine of freedom of contract reflects the view that its parties (the individual employer and employee) are in the best position, and the most motivated, to determine the efficient allocation of labour resources.[6] The parties signify by their agreement what the efficient period of hiring shall be. Legislative prescription which supplants the parties' own determinations is likely to impose a less efficient arrangement. Contract is therefore the appropriate legal form of expression, backed by the recognition of such efficiency-promoting private property

[6] An "efficient" allocation of labour is one that maximizes the wealth which can be produced by the deployment of that resource. That wealth will be reflected initially in a greater surplus for the firm and hence in the "internal efficiency" of the firm. On wealth maximizing contract rules generally, see A. Kronman and R. Posner (eds), *The Economics of Contract Law* (Little Brown, Boston, 1979) Ch. 1. In application to labour, see e.g., O. Williamson, "Transaction-Cost Economics: The Governance of Contractual Relations" (1979) 22 *Journal of Law and Economics* 233.

entitlements as the right of the worker to sell his labour and the right of the employer to deploy his capital.

In practice, the employment relationship is commonly one in which the exchange of labour for remuneration is made over a period of time, performance is a complicated undertaking, and circumstances, particularly regarding the supply of work, alter as conditions change and contingencies materialize.[7] Consequently, the parties may find it difficult, and costly, to specify how long the hiring is to last or in what events it will end. In giving precedence to express terms, the law of contract leaves it open to the parties, either at the outset or in alterations to the original contract, to fix the period of hiring or specify the contingencies in the event of which the hiring will determine. The parties incur the costs of informing themselves of the likely course of the work, of drafting a term to suit these circumstances, of reaching an agreement on a proposed term, and of enforcing the agreement to the term where a dispute subsequently arises. In regard to employment, an American, O. E. Williamson, has been the most perceptive analyst of these "transaction costs".

The economies of scale of collective bargaining suggest a way to reduce these costs. However, in Australia and Britain, collective bargaining faces legal obstacles. The common law has not been as ready to recognize those terms which are reached collectively as those which are reached individually; the collective parties must draft their agreement carefully if they wish it to have the force of law.[8] It seems that an intention to create legal relations by the agreement must be clearly evidenced. In addition, uncertainties surround the standing of the collective parties to seek enforcement of protections obtained for individual employees and employers. Consequently, the individuals must either be made parties to the collective agreements or agree (although not necessarily expressly) to incorporate the collective agreement in their own contracts. The law has not readily accepted that the union representatives are the agents of the members for the purpose of fixing contractual terms.

Despite the reluctance of the common law to support collective agreements, the law of individual contract still serves a standardizing function. It not only recognizes the parties' own express terms (if they have any), but it also provides a means of adjustment in the absence of an express specification. The courts imply into the contract of employment, in the absence of an inconsistent express term, a reciprocal right to end the contract simply by giving reasonable notice, a period commonly confined to a week's notice. Indeed, even if the parties agree to some security of

[7] O. E. Williamson and ors, "Understanding the employment relation: the analysis of idiosyncratic exchanges" (1975) 6 *Bell Journal of Economics and Management* 250.

[8] See R. Lewis, "The Legal Enforceability of Collective Agreements" (1970) 8 *British Journal of Industrial Relations* 313. Although the matter has rarely been tested, it can be assumed similar legal problems would arise in the Australian jurisdictions, cf. *Administrative and Clerical Officers' Association* v. *The Commonwealth and the Minister for Industrial Relations* (1979) 53 A.L.J.R. 588 (agreement to check-off union dues).

tenure and circumstances change so that the employer (or employee) thinks he can deploy his resources in some other, more profitable, use, the courts do not on the whole require the original contract to be completed: the party in breach is required only to pay damages and the innocent party is obliged to mitigate his losses by seeking other employment.

In regard to the operational requirements of the firm, the employer thus enjoys the right to determine the hiring as he considers it necessary to do so. In economic terms, the right is conferred upon the employer because he is in the best position to anticipate when the supply of work will cease, when it is cheaper to lay-off a worker rather than hold him over, when it is cheaper to pay off a worker rather than have him work out his term, and so on.[9] Accordingly, the employer may put off the employee so long as he pays him the sum fixed by law: a sum easy to ascertain and limited in amount so that it may readily be incorporated in the employer's cost-benefit analysis.

(ii) Political justification

This Neo-Classical economic interpretation of the principles of contract has a parallel in political philosophy. On the evidence of the language of the courts (in contrast perhaps to their underlying policies), the philosophical dimension has been the predominant one. Employment law has been treated as a matter of the freedom of the individual to choose with whom he works. The individual employee and employer have been regarded as the primary subjects of the common law. They have been treated as equal before the law, and the values of reciprocity and mutuality in their relations invoked to support their rights to terminate the employment unilaterally. Employment relations have been characterized as personal relations. Personal confidence and trust have been considered essential to the continuation of the relationship, and specific performance of the contract has been refused because it would compel personal relations and it would be difficult to supervise.

It is not hard to find criticism of these theories of contract in the literature, particularly in their application to consumer, and to employment, contracts. The critics, Marxist and less radical, argue that the theories overlook the way in which such contracts are in reality filled out in what is, to them, a structured and unbalanced economy. Following Marx, many significant industrial relations commentators, in particular Kahn-Freund,[10] Hyman[11] and Fox[12] in Britain, and Higgins[13] and Sorrell[14] in Australia,

[9] G. Calabresi and A. D. Melamed, "Property Rules, Liability Rules and Inalienability: One View of the Cathedral" (1972) 85 *Harvard Law Review* 1089.
[10] O. Kahn-Freund, *Labour and the Law*, (Stevens, London, 1972) 8.
[11] R. Hyman, *Industrial Relations: a Marxist Introduction*, (London, MacMillan, 1975) 126.
[12] A. Fox, *Beyond Contract: Trust, Power and Work Relations*, (Faber, London, 1974) 184.
[13] H. B. Higgins, *A New Province for Law and Order*, (Dawsons of Pall Mall, London, 1922) 40.
[14] G. H. Sorrell, *Law in Labour Relations: An Australian Essay*, (Law Book Co., Sydney, 1979) 29.

have expressed scepticism about the real extent of freedom of contract. Economists too argue that market imperfections such as lack of full information and inequalities in bargaining and other economic power, and market failures such as the inability to represent certain non-economic values, mean decisions on jobs made in the market cause waste, friction and hardship. Imperfections will cause errors to be made in assessing the requirements for a firm to preserve or improve efficiency and lead to the assertion of sectional interests prejudicial to overall efficiency. Failures will mean the neglect of distributional and social welfare implications.

The commentators differ, of course, in the extent of their criticism and in the changes they think necessary. Some, such as Williamson, argue that the content of contracts would improve, if the shortcomings of the market were remedied. In the labour area, this might mean giving greater recognition to collective bargaining over individual bargaining (but without conceding labour monopolies). Paradoxically, it might also mean that less, rather than more, intervention by the courts in the content of the relationship was desirable today. Fox was of the opinion that "[t]heir needs [the property-owning classes] were met by infusing the employment contract with the traditional law of master and servant, thereby granting them a legal basis for the prerogative they demanded. What resulted was a form of contract almost as far removed from the pure doctrinal form as the status relationship which had preceded it".[15]

Critics such as Kinsey and Klare[16] would not be satisfied with reforms that led to changes in the content of employment contracts. They contend that the form contract takes, as well as its content, is politically infused. In their view, it is profoundly significant that the law treats the labour relation as one of commodity exchange, when it is in fact dealing with the conditions of use of a person's labour-power rather than the sale of a material object such as a good.

(iii) Legislative intervention

Legislative intervention has thus been justified as an attempt either to remedy the deficiencies of labour contracts or to create a different foundation for the labour relationship, based on status as a member of an organization, an industry or an occupation. The second approach turns attention more to the character and interests of the groups to which the individuals belong and the institutional settings of those groups than to the personal relations between two natural persons. This would be more appropriate in the case of large, corporate employers rather than small single traders, and the law might have to make some distinctions between the two in its requirements.

[15] Fox, op. cit. 184.

[16] R. Kinsey, "Despotism and Legality", in B. Fine et al. (eds), *Capitalism and the Rule of Law*, (Hutchinson, London, 1979) 46; K. Klare, "Labour Law as Ideology: Towards a New Historiography of Collective Bargaining Law" (1981) 4 *Industrial Relations Law Journal* 450.

Only the most academic of readers would not be interested in the actual prospects of the Commission accepting the criticisms of contract and imposing a requirement of good cause to terminate. At a time when unemployment is high and further displacements are foreshadowed by structural changes in the economy, employees and their unions become more interested in job protection laws. In these same circumstances, however, their industrial power is reduced, even after some allowance is made in this estimate for those who are so solidly organized and strategically placed that their co-operation is required in the introduction of new technology and the re-organization of industries. The A.C.T.U. test case strategy is to seek legal protection for both the strong and the weak. How will the Commission respond to its claim? Before it can be suggested that the Commission will make a requirement of good cause a standard obligation, it may be necessary to credit it with some "autonomy" to move according to its own view of the merits of protection and against the tide of the market. As its treatment in the work of McCarthy,[17] Perlman[18] and Dabscheck[19] shows, the extent of the Commission's particular capacity to transcend economic and industrial pressures is both a matter of great interest and of some doubt.

Before, however, entertaining such a notion that the law in general and the Commission in particular enjoy some capacity to respond not only to changes in the balance of economic interests (where the unions become stronger) but also to developments in social policy (such as a concern for the welfare of the weak), it is necessary to consider whether a requirement of good cause would have much impact upon the freedom to terminate. Its impact will, amongst other factors, depend on the definition of "redundancy" as a cause for termination, the remedy for dismissal without such good cause, and the likely resistance to its award. The Commission may mean to protect jobs but the policy may be ineffectual or it may be counterproductive. The law may only function to alter the way in which terminations are effected but not to restrict their numbers. Indeed the award may act only as a symbol of concern for job security.

It is necessary, then, to identify the sorts of market decisions which the circumscribing of "redundancy" as a cause for termination might be expected to check; then, to consider the strength of the remedy for dismissal without such good cause; then, to consider the costs the award would create and the extent of likely resistance to it. This course presents an opportunity to rehearse the various characterizations of "legislative" intervention in the employment relationship.

[17] P. G. McCarthy, "Employers, The Tariff and Legal Wage Determination in Australia: 1890-1910" (1970) 12 *Journal of Industrial Relations* 182.
[18] M. Perlman, *Judges in Industry: a Study of Labour Arbitration in Australia*, (Melbourne University Press, Melbourne, 1954).
[19] B. Dabscheck, "Theories of Regulation and Australian Industrial Relations" (1981) 23 *Journal of Industrial Relations* 430.

THE BENEFITS OF A LEGISLATIVE PROTECTION

(a) Correcting errors made by employers in determining the needs for efficiency

A requirement of good cause may act to correct decisions to terminate that are made in good faith by the employer on the ground of efficiency but are nonetheless based on a mistake of fact.

While maintaining a genuine concern for the efficiency of the firm, employers have on occasions based decisions to terminate on mistakes of fact such as an underestimation of the demand for its product, an overestimation of the costs of its operation, or a misjudgment of the productivity of new technology or re-organization.[20] These errors result from simple oversights or miscalculations and more subtle misjudgments. It is not always appreciated, for instance, that higher manning scales can improve the safety and quality of work, and so increase the firm's productivity and patronage; such prospects look uncertain and indirect in comparison with the cost of the additional employees.

Perhaps the best known local case concerned Qantas and the Australian Federation of Air Pilots. The union sought a ruling from the Flight Crew Officers' Industrial Tribunal that the decision of the employer to terminate the services of certain pilots was not justified by the organization's economic circumstances, and that, instead, the termination notices were the result of a "managerial mistake". (A review of the decision was in fact refused when the High Court agreed with the Tribunal that the union's claim did not relate to an "industrial matter" and could not be heard by the Tribunal.[21]

In legal terms, to make it possible for the courts to review and overrule such errors, the award must make the circumstances which create a redundancy at least partly objective, in the sense that the employer must point to some independent conditions that gave him reasonable ground for his opinion that the employees could no longer be efficiently employed. Thus, an objective definition of redundancy would categorize the type of circumstances that the employer should identify to his reasonable satisfaction, or that must exist in fact independent of his opinion. The opportunity for review is increased if the award controls the type of circumstances necessary for redundancy. If, on the other hand, the award requires only that there be a "shortage of work" or a "reduction in operations", without a delineation of the acceptable causes for such a state of affairs, while the employer cannot purport to act on a shortage or reduction that does not

[20] Examples of cases under the British legislation are *Bromby & Hoare Ltd* v. *Evans* [1972] I.C.R. 113; *Delanair Ltd* v. *Mead* [1976] I.C.R. 522.

[21] The dispute is summarized in the report of the High Court's decision in *R.* v. *Flight Crew Officers' Industrial Tribunal; ex parte Australian Federation of Air Pilots* (1971) 127 C.L.R. 11. See also *Federated Ironworkers' Association of Australia* v. *Stewarts and Lloyds (Australia) Pty Ltd* (1969) 126 C.A.R. 967; *Evans Deakin Industries Ltd* v. *Amalgamated Engineering Union* (1969) C.A.R. 228; *Food Preservers Union and ors* v. *Riverland Fruit Products Co-operative Ltd* (1978) 20 A.I.L.R. 411 (12).

exist, he can create the prerequisite state of affairs himself without too much trouble.

The definition inserted in the *Vehicle Industry (Leyland) General Award* 1976[22] serves as an illustration of the distinction being made here:

> "Redundancy, for the purpose of this clause shall mean an employment situation arising out of the work normally available being reduced because of production or market fluctuations or because of Company reorganization, resulting in the number of employees exceeding the number deemed by the Company to be necessary for the performance of available work."

This definition attempts to provide that the tests of both production or market fluctuations and of company re-organization be, broadly speaking, objective, while the test of the need for workers to perform the remaining work, is clearly subjective.

The prevention of mistakes by the employer lies also in formalizing the internal decision-making process of the firm (or authority). In particular, the law may require the employer to be more deliberate in his identification of the changes in the operating conditions of the firm and in the determination of the need to retrench employees.

Structuring the internal decision-making process will be easier in the case of those employers which are bureaucratic in character. For example, at a time when it was apprehensive about university cutbacks, the Federation of University Staff Associations drafted guidelines on redundancy and retrenchment procedures which proposed that any procedure be staggered so as to require three decisions, moving from "establishment of the fact that a situation of financial exigency exists", to "identification of the areas in which redundancies may occur", to "determination of which staff members are to be declared redundant".[23] In their campaign against the *Commonwealth Employees (Redeployment and Retirement) Act* 1979 (Cth), the public service unions unsuccessfully sought provision for appeal against the determination of the employer that a department or authority was overstaffed (that there was a greater number of employees than was necessary for the efficient and economical working of the department or authority), while provisions were made for appeal against any consequent declaration that a particular employee was eligible for redeployment and against any redeployment action subsequently taken.[24]

This approach to the consideration of reductions in a workforce can be linked with the general extension of the procedural standards of natural

[22] (1977) 188 C.A.R. 263.
[23] These draft guidelines were circulated (for discussion by the university staff associations) from the federal office of the Federation on 21 November, 1980.
[24] D. Yerbury, "Recent Developments Affecting Retirement and Redeployment Rights in the Commonwealth Public Sector" (1980) 6 *Australian Bulletin of Labour* 145.

justice and due process.[25] These standards were required initially of decisions concerning high office, to act as a check to hasty or arbitrary action by public employers. They have since been extended towards lesser grades of public employment and to others employed under statutory schemes. In Britain, the employment protection legislation has extended the obligation of procedural fairness to most private employers, by requiring them to act fairly, in the sense of giving warnings, hearing out the employee, and the like, before they invoke one of the recognised causes for dismissal.[26] This development may be allied with the practice of the Commission and of state industrial tribunals in reviewing individual dismissals where it is alleged that the dismissal is harsh, unjust or unreasonable.[27]

Hasty or erroneous action may also be avoided if the employer hears the union's arguments against retrenchments. To this end, employers have been compelled by law in some countries to give unions early warning and to consult on contemplated reductions in the workforce; occasionally, the same procedures have been recommended in Australia.[28] The A.C.T.U. wanted decisions with redundancy implications to be required subjects of consultation and agreement between employers and unions.[29]

In similar vein, employers may be required to notify public authorities of intended retrenchments. In part, this is to allow the authorities to search for other employment for the workers, but it may, especially where the authority is an industrial tribunal, allow time for alternatives to retrenchment to be explored before it is too late to consider them.

(b) Detecting other motives for termination

The opportunity for review created by objective criteria of redundancy might act as a pressure for more efficient decision in those cases which the parties cannot be relied upon to reach such decisions privately.

Subjective criteria, on the other hand, in accommodating the variety of motives an employer may have for reducing his workforce, allows for terminations designed, say, to increase his share of the returns to the firm, a result that will not always be consonant with increased efficiency. It encompasses changes made to increase other sorts of satisfaction, such

[25] G. Ganz "Public Law Principles Applicable to Dismissal from Employment" (1967) 30 *Modern Law Review* 288. Further, L. E. Blades, "Employment At Will vs. Individual Freedom: On Limiting The Abusive Exercise of Employer Power" (1967) 67 *Columbia Law Review* 1404.

[26] See e.g. S. Anderman, *The Law of Unfair Dismissal*, (Butterworths, London, 1978).

[27] J. W. Shaw, "Reinstatement in Employment: A Note on Developments in the Law" (1977) 19 *Journal of Industrial Relations* 187; A. P. Davidson, "Reinstatement in Employment Jurisdiction under the Industrial Relations Act 1975 (Tas.)" (1981) 7 *University of Tasmania Law Review* 62.

[28] S. Deery, "Trade Unions, Technological Change and Redundancy Protection in Australia" (1982) 24 *Journal of Industrial Relations* 155.

[29] The Commission ruled that this claim was invalid because it concerned the relations of employers and unions rather than the relations of employers and employees.

as an inclination to change to a more respectable line of business, a less onerous one, or a more pleasantly located one. More commonly, in an age of corporate employers, decisions to change products and processes may be influenced by a desire to increase prestige or control, both inside and outside the corporation.[30] For example, in re-organization, say after take-over, individuals may lose their positions because they are identified with one or other of the interest groups which are vying for supremacy. Automation may be implemented to serve the technicians' interest in assuming more important functions or the managers' interest in securing independence from the shop floor workers.

In administering section 5 of the *Conciliation and Arbitration Act* 1904-1981 (Cth), the Federal Court has been called upon to assess defences by the employer that he dismissed the employee because of redundancy rather than union activity. The Court ruled, for instance in *Voigstberger* v. *The Council of the Shire of Pine Rivers*,[31] that the dismissal was due to the employee's claim that she was entitled to the benefit of an award rather than redundancy because the evidence showed that the employer had continued to require duties of the kind undertaken by the employee to be performed after the employee was dismissed. A refinement of the issue was presented to the Federal Court in *Jefferson Hyde* v. *Chrysler (Australia) Ltd*[32] when it was alleged that, while some retrenchments were justified because of declining car sales, the particular employee was selected for retrenchment because he was considered a trouble-making shop steward.

Similarly, a union's opposition to terminations may be motivated by a fear of losing membership and the power and standing which go with it. It is useful to note in this respect that the requirement of cause clarifies and underlines the employer's right to terminate where redundancy does exist. A limited but recognized ground for termination may make it easier industrially for the employer to reduce his workforce.

These two functions of legislative intervention can be related to the failure of contract in the following way. Market imperfections mean in practice that the parties do not always, indeed do not have to, make efficient decisions. The imperfections most frequently encountered are disparities in information and inequalities in bargaining power, which, it is argued, contribute to asymmetrical employment relations. On this view, the individual employee is rarely well enough informed to judge whether the employer's specification of the period of hiring or his decision to terminate the employment is justified as a matter of efficiency. On the

[30] S. M. Kriesberg, "Decisionmaking Models and the Control of Corporate Crime" (1976) 85 *Yale Law Journal* 1091. Specifically, R. Martin and R. H. Fryer, "Management and Redundancy: An Analysis of Planned Organizational Change" (1970) 8 *British Journal of Industrial Relations* 69.

[31] (1982) *Butterworths Federal Industrial Laws Supplement*, para. 84.

[32] (1977) *Butterworths Federal Industrial Laws Supplement*, para. 84.

whole, it will be cheaper for the employer to discover and adduce the information required for rational judgments. The requirement to show cause places the onus on the party generally in a better position to make the internal economic cost-benefit assessment. Similarly, as a consequence of the employer's superior bargaining power, the individual employee is rarely in a position to resist the employer's terms even if they can be seen as inefficient. The requirement of cause provides the weaker party with some protection.

As compared to individual bargaining, collective bargaining tends to even the parties in strength (and sometimes to shift the balance in favour of the employees). Experience suggests, however, that the union is often not much better informed than the individual employee. New, "auxiliary" laws requiring early warning, consultation and disclosure, similar to those to be found in other countries where collective bargaining is more developed, would increase the information available to the union. While some unions have considerable bargaining power, it is perhaps in the cases where jobs are under threat, where, especially, the employer suggests that he will shift his investment to another sector or locality, that the employees as a group have the least bargaining power. In such a situation, the union is prepared to forego the jobs of individuals threatened with retrenchment in order to protect the balance of the positions. It should be noted, as well, that only about half the Australian workforce are presently represented by unions. So it may not be said that unions act to redress the information and bargaining imbalances for all employees in Australia.

(c) The Commission's attitude

At this point in the examination of the claims for intervention, it is instructive to consider the extent to which the Commission has been prepared to discriminate against terminations made as a result of misjudgments of the requirements of the firm to maintain or increase efficiency, or against terminations made as a result of interests in other objectives. The Commission was prepared to recognize the agreement reached by the parties in the Telecom maintenance centre dispute that no redundancies were to result from the introduction of new technology.[33] But, so far, the Commission has not been prepared to discriminate between circumstances leading to redundancies on the few occasions it has been asked by the unions to restrict the grounds for termination of employment. However, although it is true that the principles for the award of severance pay are not the prime concern of this paper, it is worth noting that the Commission has been able, in ordering severance pay, to distinguish between redundancies induced by technological and organizational changes, and redun-

[33] Deery, op.cit. 172.

dancies caused by changes in the market.[34] It seems the Commission makes the distinction on the basis of its opinion that the former are of the employer's choosing while the latter are either beyond his control or at least the limits of his responsibilities.

While the idea of the two categories has merit, their content seem somewhat arbitrary. If all the possible causes of redundancy were to be itemized, changes in government policies, say on imports, might be added to the latter; the categories developed in the award stand-down clauses could act as analogues. Consider the *Vehicle Industry Award*[35] in 1972, when redundancy was defined for the purpose of severance pay as:

> "For the purposes of this clause 'redundancy' means an employment situation arising out of the work available being reduced because of technological and/or methods changes introduced by an employer into his operations and resulting in the number of employees exceeding the number deemed by the employer to be necessary for the performance of the available work but shall not include retrenchment as a result of fluctuations in production activity because of changes in the market or in economic conditions for which the employer cannot reasonably be held responsible."[36]

Interestingly, it is rare for other countries to employ such a distinction.[37] On the one hand, it seems rather short-sighted to treat all technical and organizational changes as voluntary, as they may be introduced to head off a decline in demand or at least to deal with the unprofitable position which results from the decline. On the other hand, to act as a deterrent,

[34] E.g., *Re Clerks (Oil Companies) Award* 1966 (1968) 122 C.A.R. 339; *Re The Jetair Australia Ltd Air Pilots' Agreement* (1970) 136 C.A.R. 967; *The Vehicle Builders' Employees Federation* v. *General Motors-Holden Pty Ltd* (1972) 142 C.A.R. 95; *Re Australian Workers' Union (Major Victorian Civil Construction Projects) Redundancy and Severance Payments Award* 1977, (1978) Law Book Co. I.A.S. Current Review Z 110; *Re Municipal Officers' (South Australian) Award* 1973 (1978) 20 A.I.L.R. 262; *Federated Ironworkers' Association of Australia* v. *Johns Perry Ltd and ors* (1979) 21 A.I.L.R. 157; *The South Australian Institute of Teachers* v. *The Kindergarten Union of South Australia* (1979) 21 A.I.L.R. 136. But cf. *Australian Federation of Air Pilots* v. *Connellan Airways Pty Ltd* (1970) C.A.R. 964; *Merchant Service Guild of Australia* v. *Department of Main Roads N.S.W.* (1971) 140 C.A.R. 875; *Federated Ironworkers' Association of Australia* v. *John Lysaght (Australia) Ltd* (1973) 149 C.A.R. 846; *Re Wattle-Pict Brooklyn Severance Pay Award* (1975) Butterworths Federal Industrial Laws Supplement para. 233; *Food Preservers Union of Australia* v. *J. Ambrose Pty Ltd and ors* (1976) Butterworths Federal Industrial Laws Supplement para. 233; *Re Journalists (Canberra Times) Agreement* 1971 (1977) 183 C.A.R. 928; *Re Victorian Meatworks and By-Products Agreement — Award* 1976 (1978) Butterworths Federal Industrial Laws Supplement para. 233.

[35] *Vehicle Builders' Employees Federation of Australia* v. *General Motors-Holden's Pty Ltd* (1972) 142 C.A.R. 95.

[36] Ibid. at 117.

[37] Provisions in other countries have been gathered and summarized in several publications, among them J. B. Cronin and R. P. Grime, *Labour Law*, (Butterworths, London, 1970); International Labour Office, *Termination of Employment: General Survey by the Committee of Experts on the Application of Conventions and Recommendations*, (I.L.O., Geneva, 1974) and *Termination of Employment at the Initiative of the Employer*, (I.L.O., Geneva, 1980); M. Freedland, "Redundancy Procedures and the E.E.C." (1976) 5 *Industrial Law Journal* 24; B. Hughes, "Redundancy: Some Insights from Overseas Experience" (1975) 17 *Journal of Industrial Relations* 356.

The legislation cited here can be found in the International Labour Office, Legislative Series (a periodic translation and publication of important new labour legislation).

it might be justifiable to include in the voluntary situations, bad management, excessive expenditure, the use of defective machines, disagreement with business parties, and the like. It may be that the Commission was inclined to exclude economic redundancies, especially if the employer was closing, because it thought that employers in these circumstances could not afford to pay. This situation can be anticipated by requiring the employers to contribute to a fund while they are prosperous. It has been added that, in an era of diversified enterprises and interlocking companies, it is not always the case that economic redundancies signify the collapse of an employer; rather they may cut short losses or reduced profits in one sector of operation or investment. A useful distinction can be made here between small and large employers.

Nonetheless, the Commission's distinction goes some way to identifying those cases in which the employer must perforce cutback to maintain the original position of the firm and those in which his benefits are increased as a result of the redundancies. In the latter cases efficiency may be improved, but the Commission recognizes that there is a pattern to the distribution of the benefits of that efficiency that favours the employer. In other words, where the employer increases his profits or other sources of satisfaction at the expense of some of the employees, his gain may be offset by payments to these "losers".

(d) Including distributional considerations

A requirement of cause might thus be proposed on the basis that it could order the way in which the losses sustained in contraction of an enterprise are distributed among the groups within the firm. For example, where terminations do not signify bankruptcy or closure, one relevant consideration might be whether some reduction in profits would be required before terminations were justified. In this vein, it might be relevant that, although it maximised the wealth of the firm to terminate rather than to retain, the benefits of this course, would be enjoyed by the group which was already "better off".

One manifestation of this view, which falls short of the prohibition of dismissals, is the Swedish requirement that the employer explore within the firm all alternatives to termination and, in particular, that he attempt to provide suitable alternative employment; occasionally, the Commission has exhorted employers to do the same locally.[38]

The developing notion of "property in the job" may also be linked with the distribution consideration. Meyer suggested in 1964 that changes in

[38] E.g., *Act respecting the protection of employment* 1974 (Sweden), section 7; *Act respecting the relationships between workers in associative work* 1973 (Yugoslavia), section 57. For exhortations of employers to do the same here, see *Australian Federation of Air Pilots* v. *Ansett-A.N.A.* (1968) 122 C.A.R. 951; *Federated Clerks' Union of Australia* v. *Orange Abattoir Pty Ltd* (1975) I.I.B. 1156; *Food Preservers Union of Australia* v. *Lea and Perrins (Aust.) Pty Ltd* (1977) 19 A.I.L.R. 462(6); *John Sutherland & Sons* v. *Food Preservers Union of Australia* (1980) Law Book Co. I.A.S. Current Review B 125.

the nature of employment had made such a notion appropriate.[39] The "job" had increasingly become a recognizable object interposed between the employer and employee. In the biggest sector of the economy, the employers had become large and institutional; the employee had become more functional and specialized. Positions and offices were created that could be regarded as objects capable of possession and of loss.

To date, the acceptance of the notion has since been reflected in several legal trends. Both in Australia and in Britain, the economic investment made by the employee in his position has since been given recognition by several rulings of the courts and tribunals:[40](a) in considering such factors as length of service, skill acquired and contributed, and other positions passed up, when determining the period of notice reasonable to terminate the employment; (b) in including among the damages for wrongful dismissal such heads as loss of pension rights; (c) in awarding severance pay where career expectations have been frustrated and ordering sums based on years of service to compensate for the loss of the fringe benefits which the anticipated length of service was to attract; and (d) in ordering reinstatement of the contract in a case of wrongful dismissal where continuity was required to entitle the plaintiff to a pension.

Given its emphasis on such features as length of service, skills, and career expectations, the notion of property in the job has not fitted as readily those workers traditionally employed on short contractual hirings and moving between several employers, who nevertheless have followed an industry and depended upon it for their livelihood. Some support for their position has however been afforded by more liberal criteria of continuity of service, which is often a condition of eligibility for benefits. In particular, the continuity of the contract of employment has been distinguished from the substantial continuity of employment with the one employer and portability of entitlements between employers within the same industry has been promoted.

A distributional argument of quite a different kind relates to the provision of a uniform law. It asserts that justice demands that job protection extend to all employees and not just to those who through strong unions, obtain security by private arrangement or consent award.

(e) Considering welfare and other values

The recognition of the investment made by certain workers in their job or trade does not however extend consideration to all those placed in need as a result of reductions in a workforce.

It seems that some of the costs of termination (and the benefits of

[39] F. Meyer, *Ownership of Jobs*, (Institute of Industrial Relations, University of California, Los Angeles, 1964).

[40] *Thorpe* v. *South Australian Football League* (1974) 10 S.A.S.R. 17 (notice); *Bold* v. *Brough, Nicholson and Hall Ltd* [1964] 1 W.L.R. 201 (pension benefits); *Australian Federation of Air Pilots* v. *Ansett-A.N.A.* (1968) 122 C.A.R. 951 (severance pay); *Hill* v. *Parsons & Co. Ltd* [1971] 3 All E.R. 1345 (reinstatement).

retention) are not readily "internalized" in the accounting of the firm when it considers terminations, unless it is under a legal obligation to do so. Some of these costs, like the costs of unemployment to family, community and social life, perhaps in areas already badly off, are not only external but also indirect and intangible. It proves difficult not only to trace and attribute these costs but also to weight them in a comparison with the clear money costs of retaining workers. Bargaining between the groups affected cannot be relied upon, except perhaps in small isolated communities, to bring all these costs into account. It is unlikely, if all those implicated can in fact come together, that they will agree on their respective values and the appropriate trade-off or choice between them. A legal obligation may serve to aggregate and price the interests.

(f) Reinstatement

Welfare consideration most conventionally applies at the point of the selection of the individual employees to be retrenched. At this point, age, family and financial obligations, versatility, length of service and so on, can be brought into account in order to discriminate among those who might be laid off. This assumes, of course, that some retrenchments are justifiable.

Where the "wrong" employees are selected for retrenchment, then, in accounting for the welfare implications of terminations, the issue is primarily the appropriate amount (if any) of compensation or assistance to be paid to the worker. It may mean, however, that where "damages" are not adequate, the prohibition of terminations, and the ordering of reinstatement, may be the only effective remedy. The costs of terminations may not all be economic costs; the benefits of a monetary award may not reach all those disadvantaged by the terminations. The satisfactions derived from the job, quite apart from the wage to be paid for it, comprise one of the intangible factors which might be brought into account in this way. (Of course, a job might well lose its satisfaction if it were sustained merely to provide employment.)

Do trends indicate that reinstatement could become a readily available remedy? Kahn-Freund made the point several years ago that while the content of the employment relationship is now regulated by common law rules, awards and legislation, the parties remain legally free to initiate and sever the relations (which attract obligations from these external sources).[41] Even though such requirements as severance pay may act indirectly as disincentives to termination, they do not deny the freedom to terminate directly. Nevertheless, as Merritt suggests, some legal compulsion of employment relations has carried over to the present century.[42] While that compulsion has been designed, historically, to foster an adequate

[41] O. Kahn-Freund, "A Note on Status and Contract in British Labour Law" (1967) 30 *Modern Law Review* 635.

[42] A. Merritt, "The Historical Role of Law in the Regulation of Employment — Abstentionist or Interventionist?" (1982) 1 *Australian Journal of Law and Society* 56.

supply of labour, it is increasingly in Hepple's view, being applied to the employers.[43] In Australia, this development is evidenced by the controls being placed on whom the employer may select (if he chooses to employ) by anti-discrimination laws, the orders of reinstatement and re-employment in cases of dismissals where the individual has been dealt with harshly or been singled out for industrial activity, and the obligation imposed for a time upon employers in the stevedoring industry to provide, at least collectively, all registered waterside workers with employment.[44]

To sum up, a legislative requirement brings into account considerations of equity and welfare, particularly the wider and non-economic costs of job termination.

THE COSTS OF LEGISLATIVE INTERVENTION

On the other side of the account must be arraigned the costs which may be generated by such a legal requirement. There are several sorts of costs which may be charged against job protection legislation. These include the costs of administering the legislation, the costs to the efficiency of the firm and the costs to managerial freedom. In turn, there are several ways in which these costs may be reflected; these include lower profits, reductions in the hirings of workers, higher prices for the products of the firm, and resistance to the law. It would be unwise for the legislator to overlook such costs when tempted to enact a well meaning policy of protection. This is in part because there are other interests to consider; it is also because the policy may prove to be counter-productive.

The right to review an employer's decision to terminate creates costs both for the parties and for the legal system. The early American work on employment termination laws by Martin[45] and others was concerned with the impact of such laws on the supply of labour and the freedom with which employees felt they could "quit" their employment; the later work by Fiss[46] and others on fair employment laws can be used as an indication of the sorts of inhibitions employment termination laws impose on the employer's freedom to "hire and fire" and in particular to "shed" labour.

(a) Administrative costs

The most obvious of costs is the cost of administering the law. Legal proceedings may involve delay, which postpones implementation of

[43] B. Hepple, "A Right To Work?" (1981) 10 *Industrial Law Journal* 65.

[44] S. Deery, "The Impact of the National Stevedoring Industry Conference (1965-1967) on Industrial Relations on the Australian Waterfront" (1978) 20 *Journal of Industrial Relations* 202; also R. Morris, "The Employer's Free Selection of Labour and the Waterfront Closed Shop" (1981) 23 *Journal of Industrial Relations* 49.

[45] D. L. Martin, "Job Property Rights and Job Defections" (1972) 15 *Journal of Law and Economics* 385.

[46] O. M. Fiss, "A Theory of Fair Employment Laws" (1971) 38 *University of Chicago Law Review* 235.

terminations that prove on review to be justified and redress of terminations that prove to be unjustified. Moreover, conducting proceedings involves the parties in immediate expense such as the costs of collecting evidence and hiring advocates.

Several factors influence the extent of these administrative costs. The formality of procedures and the finality of decisions are important factors. The power of the tribunal to award costs affects their distribution, so, too, does the availability of legal aid and the standing before the tribunal of union and employer officers. In this context, it should be noted that while the Commission has reviewed dismissals and made recommendations to the parties, strictly, the *Constitution* requires the courts to ascertain and enforce obligations under an award. Naturally, the courts cannot offer the same speedy and informal processing of disputes as the Commission.

Under their legislation, the state Commissions will be empowered to hear notifications. Proceedings should be simpler but problems may still be encountered, particularly if there is a large number of notifications at one time. The power to join cases together will be important; so too the opportunity to bring cases before the Commission where the employer argues that he is dismissing for other reasons (such as misconduct) and is not obliged to notify the Commission.

Some of the costs of administering the law will be incurred by the tribunals themselves. A requirement that the wider and non-economic costs of a termination must be taken into account would create a heavy burden, especially for the ordinary courts. In the first place, the introduction of these additional criteria would make the review of any one situation much more complicated. It is tempting, therefore, to say that the social and personal implications of retrenchments are too variable and uncertain to be employed in the determination of the validity of an employer's decision. For the sake of completeness and consistency, the long term and indirect social benefits of workforce reductions, for example the streamlining and rationalizing of inefficient production, would also have to be considered. The problems of proof would be sizeable. But, more importantly, the courts would be faced with the prospect of value judgments in ranking the various claims. It may be undersirable to embroil the courts in such matters. The courts themselves may develop ways of avoiding such hard choices.

It should also be noted that costs will attend disputation over the insertion of such a requirement in awards. While the force of an award is likened to the legislation of rights, it is accepted that the arbitration process incorporates elements of bargaining between the parties, who will become the subjects of the regulation. In fixing the justification requirement, arbitration will attract some of the costs and benefits of bargaining, although these may be minimized if the test case strategy is successful and the

standards so determined are applied uniformly to other industries. In the federal sphere, costs may also be generated by challenges in the High Court to the jurisdiction of the Commission to require such a justification.

(b) Costs to efficiency

Efficiency will be undermined where the courts on review misjudge the requirements for efficiency and reverse dismissals which were justified on this ground.

Efficiency would also be affected where uncertainties about the outcome of a review of a decision to terminate led an employer to decide not to terminate where it was, in fact, efficient to do so. In particular, an employer might be deterred where the costs of defending a decision outweighed the savings resulting from the termination.[47] In this regard, the clarity of the criteria and the ease with which the facts on which they turn can be identified, are important factors.

Efficiency would be reduced to the extent that the law chose to assert distributional (or welfare) concerns over efficiency (where the objectives were not compatible). The requirement might encourage the employer to plan and develop in a way which reconciled the objectives. Nevertheless, whether the two objectives can be reconciled will depend quite often on whether we mean by efficiency internal or social efficiency.

In the case of much public employment, the consideration of internal and social efficiency are not neatly separated. For example, the statutory test of whether a permanent Commonwealth public servant may be compulsorily retired is a determination whether he is no longer necessary to the efficient and economic working of the department or service.[48] Most public employers do not have the benefit of such market indicators as the level of demand at a certain price, to inform them of the efficiency of their services. Rather, employment levels must be kept in line with budgetary constraints and, occasionally, a sense of cost effectiveness in fulfilling an assigned objective. The question whether the social returns from services performed exceed the outlays must remain somewhat speculative. The employer is thus left with some discretion in selecting activities for cutback according to considerations of social policy. As the same employer, broadly speaking, is already required to meet the costs of the unemployment benefit and other social measures for the relief of unemployment, some will argue that these, too, be inserted into the calculus of the merits of compulsory retirements.

The private firm will argue, however, that it operates in a competitive environment in which the measures and objectives are clearly commercial.

[47] R. Coase, "The Problem of Social Cost" (1960) 3 *Journal of Law and Economics* 1.
[48] C. J. Arup, "Security at Law of Public Employment in Australia" (1978) 37 *Australian Journal of Public Administration* 95, 114.

It is not appropriate to attribute the costs of unemployment to its policies. In the first place, dismissed workers do not always remain unemployed for very long; where they do, the cause may not be so much the decision to terminate as the state of the labour market or some personal preference of the worker. Where the plight of the worker can be connected with the employer's decision (as the Commission has considered it can be in awarding severance pay to relieve the hardships caused by the interruption to earnings and the search for a new job)[49] the employer will say that unemployment remains a social, and hence, a government responsibility.

On the other hand, it is recognized that the government supports many firms with the provisions of infrastructure, subsidies, and controls, so providing them with protections from foreign and local competition in order to reward them for the social benefits they create. It seems fair, to some, that such firms take responsibility for their social costs in return for this support. Nonetheless, the private employer's argument, for example, that his overseas competitors are free of restrictions on terminations, does underline the fact that a legislative strategy has its costs: costs that may rebound on employees and make a well-meaning policy for their protection counter-productive.

(c) Impact on hiring patterns

The costs of job protection may be passed on to the employees or to other groups. In particular, as Rottenburg suggests, the imposition of a charge on termination may act to discourage employers from hiring as the legal requirement makes labour more costly.[50] The cost may be expressed in this way where the employer feels free to shift his investment to some more profitable activity.

As a study of the impact of the British unfair dismissal legislation indicates, instead of reducing the overall numbers employed, the effect may be that the employer becomes more discriminating about whom he selects for hiring. The employer develops recruitment policies which work against the unskilled or hard-to-place workers as he becomes more cautious about taking on the workers who are less useful and adaptable.[51] Indeed, hirings may be affected in more subtle ways: if the legislation provides for exceptions from coverage, as the United Kingdom legislation does in respect of fixed term hirings of two years or less, more hiring may be made on

[49] *Qantas Airways Ltd* v. *Australasian Airline Navigators Association* (1971) 140 C.A.R. 1072.

[50] S. Rottenburg, "Discussion: Property in Work" (1962) 15 *Industrial and Labour Relations Review* 402; also J. M. Oliver, *Law and Economics: an Introduction*, (George Allen and Unwin, London, 1979) 100.

[51] W. W. Daniel, "The Effects of Employment Protection Laws in Manufacturing Industry", *Department of Employment Gazette*, June 1978, 658-61, cited in P. L. Davies and M. Freedland, *Labour Law: Text and Materials*, (Weidenfeld and Nicholson, London, 1981) 449.

the excepted bases. Again, where eligibility depends initially on satisfaction of a continuous period of service (in Britain fifty-two weeks), a greater number of employees may be dismissed before this period ends.

Where such laws do deter hirings, or at least some types of hirings, they may benefit those in employment at the expense of those seeking, perhaps their first job. It is in these terms, perhaps ungenerously, that the action of the waterside workers' union might have been characterized when it agreed to containerization and to reductions in the number of stevedoring jobs in return for security of tenure and sizeable redundancy payments. The job protection makes it harder to remove the incumbent employees and less attractive to take on new employees.

Where his market position permits it, the employer may, instead of setting off the additional charges against some other component of his labour budget, pass the cost to his consumers in higher prices. This distribution of the costs may hurt more a group worse off than the employees, such as those consumers on fixed and low incomes.

Of course, the most immediate way in which the extra costs can be felt is a reduction in the employer's profits. This reduction may in turn mean a lower dividend for the firm's owners. It may lead the firm to close, or at least reduce the capital which the firm has to re-invest for further development, so that the policy of protection again rebounds on workers and customers of the firm. It remains the case, however, that such effects of the law are difficult to project with assurance: the employer required to provide his employees with some security may be motivated to explore ways of expanding the firm and making better use of those employees.

(d) Restriction of managerial freedom

Interference with managerial discretion and judgment may be viewd as undermining the way in which efficiency or other goals can be achieved. The Western political system also accords managerial freedom some value on its own account as an entitlement which goes with the ownership of the firm.

The High Court has said on several occasions that the constitutional industrial arbitration power was framed so as to leave some business decisions to managerial prerogative.[52] This interpretaion of the limits to the Commission's jurisdiction is a possible obstacle to intervention. Constitutional considerations are most likely to affect the way in which reviews could be conducted. It seems that, while the Commission has the power to restrict the grounds on which terminations could be justified, the subsequent review of individual dismissals would have to be entrusted to the courts. Indeed, review by the Commission itself may encounter objections

[52] D. Fisher, "Redundancy and the Law: Some Recent Problems" (1969) 11 *Journal of Industrial Relations* 212; L. Maher and M. Sexton, "The High Court and Industrial Relations" (1972) 46 *Australian Law Journal* 109.

not only because it deals with managerial rather than industrial matters, but also because it involves the exercise of judicial rather than arbitral power, the settlement of intrastate rather than interstate disputes, and the ordering of the relations of employers and ex-employees rather than employers and employees.[53]

To the extent that the Commission does have jurisdiction, it may still decline to intervene if it is of the opinion that the award sought would unduly or seriously restrict the freedom of management to innovate and operate in the interests of the shareholders and consumers. Several of the cases in which it has declined to make an award involved claims for limits to the grounds for termination.[54] The Commission has said it will not interfere with the manner in which the management conducts its business unless, and to the extent that, the manner involves oppressive, unjust or unreasonable demands upon the employees.

It is worth noting that in Portugal and West Germany, by way of example, the legislation strikes a compromise in respecting the employers' freedom to close down for whatever reasons he thinks fit, but requiring him to show good economic cause,[55] and social justification,[56] respectively, if he plans merely to reduce or alter his workforce.

(e) Resistance to the law

Faced with the prospect of such costs and controls, it is conceivable that employers may be opposed to the law. The studies in Britain of the impact of the unfair dismissals legislation may give some guide to whether a similar law would meet with resistance in Australia. In relating the findings of these studies to an Australian law, it must of course be remembered that industrial conditions differ somewhat between the two countries and that the requirements of the particular law may also. The findings of the British studies relate not only to the application of the requirement of

[53] J. O'Donovan, "Reinstatement of Dismissed Employees by the Australian Conciliation and Arbitration Commission: Jurisdiction and Practice" (1976) 50 *Australian Law Journal* 636; L. Olsson, "Job Security – the Australian Scene" (1981) 23 *Journal of Industrial Relations* 529; D. Yerbury, "Redundancy: The Response of Australian Industrial Law" (1982) 7 *Australian Journal of Management* 75.

It is worth noting that the Commission has ruled in the A.C.T.U.'s test case that it does not have the power to order the reinstatement of employees or to entitle employees to such relief. The *Conciliation and Arbitration Act* 1904-1982 (Cth) would have to be amended so as to empower the Federal Court to reinstate employees who are dismissed contrary to the provisions of their award: *Amalgamated Metal Workers and Shipwrights Union and ors* v. *Broken Hill Proprietary Ltd and ors* (1982) 24 A.I.L.R. 487.

[54] In particular, *Re Clerks (Oil Companies) Award* 1966 (1968) 122 C.A.R. 339; further, *Australian Insurance Employees' Union* v. *Abbot & Associates and ors* (1978) Butterworth's Federal Industrial Laws Supplement para. 230; *Australian Coal and Shale Employees Federation and ors* v. *New South Wales Coal Association and ors* (1983) 25 A.I.L.R. 170.

[55] E.g., *Act to approve, with amendments, Legislative Decree No. 841 c176 to prohibit dismissal without just cause or on political or ideological grounds* 1977 (Portugal), section 13.

[56] *Protection Against Dismissal Act* 1969 (West Germany), section 1(3).

"redundancy" as a reason for dismissal but also to the application of the requirement of the other recognized reasons (such as misconduct) and the requirement of procedural fairness in invoking any one of these reasons.

The *Employment Protection (Consolidation) Act* 1978 defined "redundancy" as:

(a) The fact that the employer has ceased or intends to cease to carry on the business for the purposes for which the employee was employed, or has ceased, or intends to cease to carry on that business in the place where the employee has been employed, or

(b) the fact that the requirements of the business for the employees to carry out work of a particular kind or for the employees in question to carry out work of a particular kind in the place where they have been employed have ceased or diminished or are expected to cease or diminish.[57]

After a survey of the impact of the legislation between 1971 and 1975, Weekes and his co-authors concluded that the take-up rate for review seemed low as a proportion of the total number of dismissals.[58] In 1979, Davies and Freedland noted that applications for review by the industrial tribunals had increased considerably in 1975 and 1976 (as a consequence of the reduction in the period of continuous service required for eligibility and the addition of a remedy of reinstatement), but had then levelled off again.[59]

The low take-up rates can be interpreted in various ways. The policy of job protection may be self-executing; in other words, the employers may comply voluntarily with the law's requirements. Weekes' survey indicated that 55% of large companies and two-thirds of medium-sized firms had not found it any more difficult to dismiss once the unfair dismissal provisions were in force;[60] Davies and Freedland cite a 1978 study to the same effect.[61]

In part, this was because the larger firms, in conjunction with the unions, had already developed internal rules governing dismissal criteria and procedures. This finding lends support to Selznick and Vollmer's study of the development and observance of seniority in the United States, even if their study was perhaps too optimistic in interpreting the practices as a commitment to the rule of law in industry (in that case laws made privately and internally), rather than as a response to the exigencies of

[57] *Employment Protection (Consolidation) Act* 1978 (U.K.), section 87(2).
[58] B. Weekes and ors, *Industrial Relations and the Limits of the Law*, (Blackwell, Oxford, 1975) 26.
[59] Davies and Freedland, op.cit. 390.
[60] Weekes, op.cit. 23.
[61] Davies and Freedland, op. cit. 391.

the industrial situation.[62] A study of the Australian metal trades industry indicates that industries here have also developed their own private procedures[63] and, on the whole, employers have been prepared to take part in the reviews of dismissals conducted by the arbitration tribunals in the absence of formal jurisdiction. Even so, the manner of the closedowns of the vehicle building plant at Pagewood and the mine at Clutha suggests that such practices are not always secure against changes in the economy which threaten the prospects of the employer and the bargaining power of the employees.

To return to the British experience, it was found that where the legislation required the employers to tighten the internal dismissal processes, they felt that the need to approach dismissals with more care and consistency led to less disputatious dismissals. This finding squared with Martin and Fryer's observation that limited but legitimized grounds and procedures for dismissal can make it easier industrially for the employer to lay off, as the minimum legal requirements also become the maximum ones in practice.[64]

On the whole, the legislation had an impact on the employers' procedures rather than the scope of their grounds for termination and, in particular, on the process of the selection of the individuals to be retrenched as a result of the redundancy. This was, according to Davies and Freedland, because the British tribunals had looked at the question whether dismissals were justified essentially from the managerial perspective, employing to a large extent a subjective definition of redundancy.[65] Furthermore, they had ordered reinstatement or re-engagement only sparingly, particularly where the employer could not or would not re-integrate the employee or where the employee was in part to blame for the dismissal (although it seems from later research that the employees have frequently saved the tribunals a decision by not requesting specific relief).[66]

[62] P. Selznick and H. Vollmer, "Rule of Law in Industry: Seniority Rights" (1962) 1 *Industrial Relations* 97.

[63] M. Derber, "Changing Union-Management Relations at the Plant Level in Australian Metal Working" (1977) 19 *Journal of Industrial Relations* 1, 15. More generally, see K. Pauncz, "A Survey of Redundancy Procedures" (1979) 5 *Work and People* 7. Cf. the earlier survey reported in Commonwealth of Australia, Department of Labour and Immigration, *Studies of Displacement: Employment and Technology No. 16*, (A.G.P.S., Canberra, 1975).

[64] R. Martin and R. H. Fryer, *Redundancy and Paternalist Capitalism: A Study in the Sociology of Work*, (George Allen and Unwin, London, 1973) 113.

[65] Weekes, op.cit. 27-29; Davies and Freedland, op.cit. 371-87. Note also J. Bowers and A. Clarke, "Unfair Dismissal and Managerial Prerogative: A Study of 'Other Substantial Reason'" (1981) 10 *Industrial Law Journal* 34.

[66] The most recent studies are analyzed in L. Dickens and ors, "Re-employment of Unfairly Dismissed Workers: The Lost Remedy" (1981) 10 *Industrial Law Journal* 160. Cf. P. Lewis "An Analysis of Why Legislation Has Failed to Provide Employment Protection for Unfairly Dismissed Employees" (1981) 19 *British Journal of Industrial Relations* 316. Lewis argues that it is not so much the tribunals' attitude, or the employees' own wish, but the delay between application and disposition of the case which makes re-employment an unfeasable and consequently undesired remedy.

The studies found that the legislation had more (but still slight) impact upon the internal procedures of the smaller firms in which the workers were not represented by unions.[67] In some such firms, management came under pressure to upgrade their procedures, and consequently the surveys detected some dissatisfaction with the erosion of managerial authority.[68] Consonant with this finding, it would not have been realistic to expect that all employers would internalize the values of the new law, or that they would obey it simply because it was the law. Consequently, some non-compliance might be expected where the employer calculated that the gain from unlawful dismissals outweighed the risks of detection, prosecution, conviction and penalty, or where he considered the law to be an unjust and illegitimate imposition.[69] Some employers might even be ignorant of their new legal obligations.

Low take up rates might also be explained by the attitudes of the workers to the law. Unions, enjoying the options of collective bargaining and industrial action, and mindful of their value to the workforce, might encourage their members to use them in dismissal disputes rather than make individual applications to a tribunal. It does seem that, in terms of their proportion of the work force, non-unionized, lower paid and short-term employees were over represented among the applicants to the tribunal.[70] Nonetheless, among the non-unionized, ignorance of the law and apprehension about judicial procedures, might remain an obstacle to claims. This, in turn places stress on the capacities of the official enforcement agency to detect and prosecute breaches:[71] in the Australian case, the federal arbitration inspectorate and the corresponding state inspectorates.

CONCLUSION

Ultimately, the review of employment practices at the point of dismissal may be only a small check on the overall pattern of employment and unemployment. By this stage, many economic and political forces have had their effect and many terminations seem unavoidable. Within the firm, decisions about investment, production, new technology, and marketing, have pre-empted any dispute over the terminations. Outside the firm, movements in the international and national economy, government pol-

[67] R. Clifton and C. Tatton-Brown, "The Impact of Employment Legislation on Small Firms", *Department of Employment Gazette*, July 1979, pp. 652-55, cited in P. Lewis, "Employment Protection: a preliminary assessment of the law of unfair dismissals" (1981) 12 *Industrial Relations Journal* 19, 25.

[68] Weekes, op.cit. 24.

[69] Cf. the writing on the impact of safety laws, e.g. N. Gunningham, "The Industrial Health, Safety and Welfare Act 1977 — A New Approach?" (1978) 6 *University of Tasmania Law Review* 1, 16.

[70] Davies and Freedland, op.cit. 392.

[71] Cf. the studies of the enforcement of safety laws, e.g. W. Carson, "White Collar Crime and the Enforcement of Factory Legislation" (1970) 10 *British Journal of Criminology* 383.

icies on finance and money, and so on, have set the boundaries for internal decisions. One would suspect that the floor of employment rights has done little in Britain to check the highest unemployment rates since the Great Depression.

In the light of the foregoing limitations and uncertainties, it is not surprising that a positive legislative requirement is often not regarded as the most suitable instrument by which to protect employment. It may indeed divert attention from other measures which may prove more effective. Collins' interpretation of the British legislation is to the effect that the State's assumption of jurisdiction over dismissals diverts energies away from the necessary development of collective awareness and action concerning job security. Such "corporatist" law supplants the unions' function: like the common law, it deals with dismissals individually, obscuring the essential conflict of interest between capital and labour which they are said to represent and channelling grievances into the legal process.[72]

Perhaps the legal regime may act to discourage some employers and employees from developing their own dismissal rules, when such domestic regulation would produce arrangements more attuned to the circumstances of the particular firm, and produce them quicker and cheaper than the legal process. The evidence from Britain seems to suggest that the legal requirements, particularly the requirement of procedural fairness in invoking one of the recognized reasons for dismissal, encouraged firms to formalize dismissal rules and procedures. Another commentator, sceptical of the legislation, argues that the unions have (thus) been drawn into the administration of discipline to their own members.[73] It is also worth noting that the British scheme provided for exemption from the provisions of the legislation in the case of dismissals covered by "designated dismissal procedures agreements".[74]

If, then, there is a role for State intervention, it may most conducively take the form of mediation between employer and union representatives. Legislation may properly serve the "auxiliary" function, requiring, for instance, the negotiation of changes with redundancy implications, such as the reorganization of work or the introduction of new technology, or at least should require the notification of intended changes so that conferences can take place before the retrenchments have become a "fait accompli" and the employees have lost their bargaining power. The New South Wales legislation moves some way in this direction.

Nonetheless, such collective approaches provide the individual em-

[72] H. Collins, "Capitalist Discipline and Corporatist Law: Parts 1 and 2" (1982) 11 *Industrial Law Journal* 78 and 170.

[73] S. Henry "Factory law: the changing disciplinary technology of industrial social control" (1982) 10 *International Journal of the Sociology of Law* 365.

[74] *Employment Protection (Consolidation) Act* 1978 (U.K.), section 65. In part, such agreements have to provide for remedies as beneficial as those provided by the Act and to include a right to independent arbitration or adjudication.

ployee with no guarantee of protection. There remains the case of the employee who is not covered by a union or whose union fails to represent him in a dismissal dispute. (There is also the case of the employer who believes he has good cause to dismiss but cannot argue with the union.)

So finally, in attempting to place the requirement of cause in the spectrum of employment protection measures, it may be accorded most value as a means of strengthening the legal recognition and assurance afforded the individual job-holder. Its main impact is procedural, creating an opportunity for the employee to be heard by an independent authority in the face of behaviour that seems to him to be arbitrary or irregular. Accordingly, the process of review, even the existence of the right to review, may have a "psychological" benefit.[75]

The requirement may have less to do with large scale movements in employment. It is likely to prove an adjustment in employer-employee relations only at the margins of power; it may cause jobs to be retained within a firm from time to time, but only so far as the structure of the surrounding economy allows room to move. In some individual instances, it will thus act as a protection of a job, but at an additional cost to the firm's labour budget which in turn may be borne by any of several groups including the workforce itself.

The paper is thus left with what might seem to the lawyer a disappointing conclusion. The Chicago school[76] and its more radical opponents[77] conjoin at this point in their scepticism of the prospects of legislation achieving much more than an endorsement of the existing economic realities.[78] The legislative requirement essentially only alters the way in which the economic forces are played out in disputes over terminations. It provides an orderly means of resolving disputes by structuring the process of termination.

[75] L. Tribe, "Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality" (1973) 46 *Southern Californian Law Review* 617, 629.

[76] G. Stigler, "The Theory of Economic Regulation" (1971) 2 *Bell Journal of Economics and Management Science* 3. Also note A. Fels, "The Political Economy of Regulation" (1982) 5 *University of N.S.W. Law Journal* 29, 57.

[77] E.g. P. O'Malley, "Theories of Structural versus Casual Determinations: Accounting for Legislative Change in Capitalist Societies", in R. Tomasic (ed.), *Legislation and Society in Australia*, (George Allen and Unwin, Sydney, 1980) 50.

[78] If it were possible to control for other variables over time, it would be interesting to conduct an impact survey and compare rates of retrenchments (and other dismissals) before and after local awards or legislation were enacted.