The Impact of Unfair Dismissal Regulation: Evidence from an Australian Natural Experiment

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Abstract -- This paper assesses the outcomes of a unique Australian natural experiment with dismissal regulation introduced in 1996, then radically reformed in 2006 and reregulated in 2009. We record and evaluate the impact of changes in dismissal regulation on unfair dismissal claims, how claims are resolved, and amounts of compensation paid. We draw on a large database of unfair dismissal cases under the three policy regimes, along with additional data on negotiated settlements recently released by Australian labour courts. We find the changes in regulation affect the number of claims submitted, and success rates, largely by censoring the distribution of cases which proceed to arbitration. There is little change in compensation payments across the three regimes as the legal conventions about their calculation were not affected by the regulatory changes. One theme through all our findings is the impact of administrative procedures on outcomes, which, together with the little researched outcomes from general protections cases warrant further investigation.

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1. Introduction

The regulation of dismissals has been one of the most controversial public policy issues in recent years. It has long been an important issue in Britain and continental Europe and is of growing importance in the US where many States have introduced dismissal regulation. Surveys of the international policy debate include Skedinger (2010), Kahn (2012), Howe (2016), and DTTL (2018). In Australia, dismissal regulation has been an issue on which at least one Federal election has hinged, and the major changes to unfair dismissal regulation brought by incoming governments in 1996, 2006 and 2009 have created three distinct unfair dismissal regulatory regimes (Gollan, 2009; Wilkins & Wooden, 2014; Buchanan & Oliver, 2016). For researchers, the changes in Australian dismissal regulations provide a unique natural experiment which can shed light on the interaction between laws, procedures and the underlying behavioural relations, which drive outcomes for different regulatory regimes. No other country has changed dismissal regulation as radically as Australia over such a short period of time.

To assess the impact of dismissal regulation we need good data. For Britain researchers have used the Workplace Industrial Relations Survey - for instance Knight and Latreille (2000a, 2000b) and Wood Saundry and Latreille, (2017). A sample of the numerous European empirical studies includes Berger and Neugart (2011), Boeri Garibaldi and Moen (2017), and Jimeno Martínez-Matute and Mora-Sanguinetti (2018). US researchers lacking large scale surveys have had to rely on comparisons of outcomes between states - for instance Autor Donohue and Schwab. (2004), and Colvin's comparisons of Ontario and Pennsylvania arrangements (Colvin, 2006) or American Arbitration Association records that Californian state law requires be filed on cases (Colvin, 2011). Australia unfortunately no longer conducts a large workplace industrial relations survey, though FWC (2015) is a recent attempt to remedy this. In the absence of comprehensive workplace industrial relations surveys Australian researchers Freyens and Oslington (2007) used data from detailed interviews with employers to estimate the costs and employment impact of unfair dismissal regulations existing at that time.

In this paper we draw from a large database we have constructed of unfair dismissal cases decided by the Australian *Fair Work Commission* and its predecessor bodies over the period 2001-2015. The cases number over two thousand and are spread over the three Federal dismissal regulatory regimes. We also utilise recently released data on monetary settlements at unfair dismissal conciliations and arbitration hearings conducted by the *Fair Work Commission*,

and data on outcomes of the growing number of cases under the general protections provisions of the *Fair Work Act*

The purpose of this paper is to assess the impact of different regulatory regimes on the number of claims lodged, claimant probabilities of success, and compensation awards to dismissed employees. These variables are prominent in Australian policy debates. For instance changes in claimant success rate reported by the *Fair Work Commission* have attracted press attention and triggered changes to policy. Large awards to dismissed employees have generated public debate and policy changes, in our view disproportionate to their underlying economic impact. Numbers of claims and how they are dealt with are important in justifying the role of *The Commission* and the unfair dismissal system. As suggested in the title of the paper relationship between Australian policy changes and these variables is evidence which can guide dismissal policy in Europe and elsewhere. It can do this both through the example of different institutional arrangements and by shedding light on the underlying behavioural relationships.

The paper continues with a brief review of the economics of dismissal regulation in section 2, an outline in section 3 of the main changes in Australian dismissal regulation (from the *Workplace Relations Act* 1993-2006, through *WorkChoices* 2006-9 to the *Fair Work* system which began operation in 2009) and a description of our data sources in section 4. We compare outcomes between the three regulatory regimes in section 5, and section 6 concludes and offers ideas for further work

2. The Economic effects of Dismissal Regulation

Dismissal regulation raises the cost of employing labour as there is a probability that any worker hired will be dismissed at some stage and may lodge an unfair dismissal claim, leading to administrative costs, legal costs and possibly a compensation payment. These costs and probabilities can be estimated and a simple labour demand model calibrated to determine the effect of dismissal costs on aggregate employment. A seminal contribution was Bentolila and Bertola (1990) and surveys of this type of work include Bertola (1999), Saint-Paul (2000), Addison and Teixeira (2003) and Boeri and Van Ours (2008). Freyens and Oslington (2007) did this exercise for Australia and found the employment effects of dismissal regulation to be quite modest, in contrast to government claims of very large negative effects on employment.

Dismissal regulation has other effects besides the impact on aggregate employment. Higher dismissal costs increase the bargaining power of incumbent workers, which can be exploited depending on the environment in the form of higher wages or reduced effort - as in Gregory (1986). Regulation also reduces turnover, and the capacity of the firm to remove workers who reveal themselves after hiring to be less productive, thus reducing the average productivity of labour, assuming there is a distribution of worker types with different productivities, and some productivity information is only revealed after hiring - as in Freyens (2018). In addition, dismissal regulation can adversely affect worker effort as suggested by Martins (2009). Reduction in turnover can also reduce productivity by reducing the quality of job-worker matches. Positive productivity effects might come from greater incentives for employers to invest in workers with longer expected tenures. All these productivity effects are difficult to model and even more difficult to estimate empirically - as discussed by Autor et al. (2007).

A subtle effect of dismissal regulation is to penalise high-risk workers, such as those returning to the labour force after a break to rear children, or those with a disability or criminal record. If the employer is choosing between a standard worker with a known record and a riskier worker, then dismissal regulation will reduce incentives for the employer to undertake post hiring sorting and tip the employment decision towards the safe worker. Bertola (2014) formally models some of these distributional effects, including distribution of risk.

The current consensus in the economics literature is that dismissal regulation has a modest negative effect on aggregate employment (OECD, 2013). However, the bargaining power effect of dismissal regulation increasing wages of incumbent workers and hurting prospects of new entrants to the labour market, and the subtle discrimination against risky job seekers induced by regulation mean that not all the social justice arguments are on the side of those advocating stronger regulation of dismissals.

3. Institutional Background

Dismissed employees in Australia, like many other countries, have for a long time been able to take legal action over breach of employment contracts under the common law of employment. Australian Federal regulation of unfair dismissal began with the Keating Labor government's 1993 *Industrial Relations Reform Act*, which utilised the external affairs power of Australia's Constitution, and was modelled on the International Labour Organisation's *Convention on Termination of Employment*. From the 1980s Australian industrial tribunals established

conventions for payments to dismissed workers, especially workers who became redundant through no fault of their own, and redundancy pay began to be introduced into industrial awards. Under the new legislation some dismissals were defined as unlawful (for instance for pregnancy or other discriminatory reasons) and a further class was defined as unfair if they could be shown to be "harsh, unjust or unreasonable". Redundancy, defined as a situation where the job is no longer required, was a valid reason for dismissal, and redundancy payouts to the employee specified in the legislation according to tenure. The Australian Industrial Relations Commission handled disputes over dismissal and could make orders for reinstatement or compensation to dismissed employees.

Some Australian states, beginning with South Australia in 1972, introduced their own dismissal regulations which continued after the introduction of the Federal legislation, leaving a complex web of regulations with jurisdictional ambiguities. New South Wales was a pioneer in legislating redundancy pay in its 1982 *Employment Protection Act*. In 1996 the State of Victoria referred its power to legislate on unfair dismissal matters to the Commonwealth. Many cases were brought in the early years of the Federal Act, generating protest from employers' associations. The legislation and procedures were refined in the years which followed until a more workable balance appeared to have been achieved under the renamed *Workplace Relations Act 1996*.

The election of the Howard Liberal/National government in 1996 renewed pressure from employers to remove unfair dismissal regulation, especially for small business[1]. When the Howard government achieved control of both houses of Federal Parliament in 2005, reform of unfair dismissal regulation was announced as the centrepiece of the government's "WorkChoices" changes, embodied in the *Workplace Relations Amendment (Work Choices) Act 2005*. Coverage of workplaces by Federal dismissal laws partly increased as the legislation utilised the corporations power of Australia's constitution thus no longer restricting the application of unfair dismissal provisions to employees covered by federal awards and agreements. However, this increase in workforce coverage was more than offset by major restrictions to the circumstances under which a claim is lodged: businesses employing less than 100 workers were exempted from unfair dismissal claims, and a redundancy was redefined as a dismissal for "genuine operational reasons" (such reasons only had to exist, not that the dismissal be required by these operational reasons) potentially expanding opportunities for employers to present a dismissal for cause as a genuine redundancy. Thus, although the coverage of workplaces by Federal laws expanded under WorkChoices (by substituting State

laws), the overall coverage of employees declined in net terms relative to the pre-*WorkChoices* period (see Appendix).

After the election of the Rudd/Gillard Labor government in 2007 the *WorkChoices* legislation was repealed, replaced by the *Fair Work Act*, which came into force in July 2009, administered by a new body *Fair Work Australia*. Federal coverage of workplaces increased further with the near-full transfer of State powers (excepting those over their own public service and agencies) to the Federal Government by all states except Western Australia. Coverage also increased by easing of exemptions: employees of businesses with more than 15 employees were now eligible to claim, but employees covered by the *Small Business Fair Dismissal Code* had in principle no access to redress if the code had been followed. With some minor differences, the older definition of "genuine redundancy" was restored.

New general protection provisions introduced in the *Fair Work Act* provided an additional avenue of action against employers who dismissed workers after a complaint or an attempt to exercise a workplace right. The definition of a workplace right is very broad, but the most dangerous aspects of the general protections provisions from an employer point of view are that there is a reverse onus of proof (the employer must show the dismissal was not a response to the complaint or attempt to exercise a workplace right) and that compensation is uncapped. General protection claims are resolved differently by the Fair Work Commission to other unfair dismissal claims. The Commission attempts to conciliate, and if this is unsuccessful it issues a certificate to the parties to this effect, who may then pursue the matter in the Federal Court[2].

The *Fair Work* regime continued under the Abbott and Turnbull and Morrison Liberal/National governments, with some minor changes. The administering body *Fair Work Australia* become the *Fair Work Commission*. A notable feature has been wrangling between researchers, the Government and the Commission over the release of data, especially politically sensitive claimant success rates and payouts.

The current dismissal claims process is illustrated in Figure 1.

[Take in Figure 1]

There is a pathway for a standard unfair dismissal claim which can be settled, perhaps with conciliation assistance from the Commission, or if this fails resolved by arbitration. The newer

general protections pathway is also illustrated, where a claim may be settled (or very rarely by consent arbitration) but if this fails and a certificate issued by the Commission the case may proceed to the Federal Court. Note that values of some of the variables that emerge from our study, plus values of variables available from other sources are given in Figure 1 for purposes of illustration.

4. Data Sources

The most important source for this paper is the authors' database of economically relevant aspects of decisions published between 2001 and 2015, together with the synthetic information released annually by the *Fair Work Commission* and its predecessor bodies *Fair Work Australia* and the *Australian Industrial Relations Commission*[3]. Unfair dismissal decisions are publicly available online through the AustLii database of the Australian Legal Information Institute. Information reported is often incomplete and the economically relevant aspects of cases are sometimes reported in inconsistent or incomparable way. For instance, we encountered a few cases where the dismissal date is not reported, which makes it difficult to match a case to a specific regulatory regime, particularly in years immediately following regime changes. The lack of a dismissal date was sometimes compounded by vague orders to pay the employee's lost wages since dismissal rather than a specific amount. This is a situation where co-operation between the *Fair Work Commission* and researchers could considerably improve the quantity and quality of data public policy makers have available on an important issue.

Our database mostly records cases, which were arbitrated on merit, together with a minority of jurisdictional decisions[4]. Arbitration on merit refers to decisions made on either the substance of the unfairness claim (in relation to the employee's capacity or conduct) or on grounds of procedural irregularities with the dismissal (for instance lack of warnings about the conduct or capacity issue, failure to notify the employee of the dismissal, failure to give the employee an opportunity to reply to the allegations, or deny the employee the right to have a support person at the dismissal meeting, etc.). Arbitrations on merit exclude jurisdictional arbitrations, where the case is dismissed because the claim lies outside the jurisdiction of the Commission. Out of jurisdiction decisions involve cases lodged outside prescribed time limits, cases where the claimant was found not an employee or not having served a minimum employment period, where the claimant's wage was above the income threshold, or other jurisdictional grounds. Although the Fair Work Commission reports jurisdictional decisions as part of its arbitrated cases, such cases generate no direct costs to the business from compensation payments or

reinstatement though there are indirect costs such as lost productive time, cost of legal representation, etc. Jurisdictional decisions are mostly straightforward affairs (although there are exceptions) and published decisions about such decisions are generally much poorer in research-relevant information than cases arbitrated on merit.

The database contains 2876 unfair dismissal cases, 31 percent of which are *Workplace Relations Act* cases, 9 percent are *WorkChoices* cases, and 60 percent are *Fair Work* cases. The database does not include *Fair Work Act* general protections cases. 82 percent of our database cases are decisions on merit (substance and procedure), the remainder consisting of jurisdictional decisions (we only recorded jurisdictional decisions when there was enough relevant information in the published decision).

Compensation orders are usually recorded either as an absolute dollar amount, or as multiple of the weekly wage. One could convert the absolute amount into a relative measure (or vice versa) if the weekly wage of the dismissed employee was provided alongside with the absolute amount of compensation. However, many published decisions only provide one measure (e.g. compensation in dollars) but omit to provide the information necessary to calculate the other measure (the compensation expressed in multiples of weekly wages). The relative measure (i.e. % of annual wage cost) is analytically more useful and was previously used to calibrate the firing cost elasticity of employment (Freyens & Oslington, 2007) and to estimate the contract zone in settlement negotiations (Freyens, 2011). To obtain the relative measure we recorded all relevant background information we could such as the occupation of the dismissed employee, the Australian State, the sector of activity, and the size of the employer, then applied ABS weekly earnings categorized by State, sectors and occupation (ABS, 2010), which we adjusted for each relevant year using the time series of average weekly earnings (ABS, 2011).

The other source of data are the annual reports the *Fair Work Commission* is required under the *Fair Work Act* to publish (FWC 1996-2018), including information about numbers of dismissal claims and how they are resolved. The information released has so far been limited and presented in a way which does not facilitate comparisons between the different regulatory regimes. For instance, up until the financial year 2010-11 the Fair Work Commission only reported cases arbitrated on jurisdictional grounds where the jurisdictional objection was upheld (and the case dismissed). From 2011-12 onwards the Commission reports both jurisdictional cases for which the objection was upheld and those for which the objection was rejected (the case then progressing further for arbitration on merit). This change in reporting

procedure has no doubt contributed to the observed inflation of arbitrated cases reported after 2011, which we later comment on.

We will make use of annual report data, especially data after 2015 about payouts for conciliated as well as arbitrated unfair dismissal cases, and for general protections cases involving dismissal. Nevertheless, the annual report data remains less than ideal, with many of the conciliation payment outcomes listed as "unknown" and the amounts of the largest payouts obscured by being placed in a "greater than $40,000 band". The annual reports unfortunately do not include outcomes of general protections cases which could not be resolved by the Commission and which may proceed to the Federal Court.

5. Results

(a) Claims and Method of Resolution

The first question is which regulatory regimes generate more claims. Table 1a presents data assembled from the annual reports of Federal and State Industrial Relations Commissions and their successor bodies on the numbers of unfair dismissal cases lodged and finalised over the period 2000 – 2018.

[Take in Table 1a]

Until the significant extension of Federal coverage in 2006 discussed above about 60% of unfair dismissal claims were lodged in State courts. Thereafter over 90% were lodged with the Federal Commission. The steady stream of dismissal applications lodged with State Commissions slowed to an average 550 annual applications. Federal annual applications increased to an average 15,300 over the same period.

Columns 5 and 6 in Table 1a give an overview of the total number of applications over the 18-year period, which does not vary markedly between the Workplace Relations Act regime ending in 2006 and the Fair Work Act regime starting in 2009: annual applications average 14,200 under WRA, and 15,850 under FWA (or 14,800 if we exclude an outlier in the last year of reporting 2017-18). However, the average annual number of applications filed under the intervening WorkChoices regime is only 7,500, which is about half the number of applications made under the WRA and FWA regimes.

Table 1b displays data collected from the annual reports of the Fair Work Commission and predecessor bodies (Federal and Victorian cases) with a breakdown of finalized cases into cases resolved by conciliation, cases withdrawn or resolved post-conciliation but pre-arbitration, and those which were resolved by arbitration.

[Take in Table 1b]

Unfair dismissal claims lodged under the Federal legislation declined steadily from 8109 cases in 2000-2001 (the first *Workplace Relations Act* year for which we have data) to 6707 cases in the last full year of the Act prior to the *WorkChoices* reforms (with similar declines in State-lodged applications visible in column 3 of Table 1a). This drop in the number of applications is partly due to the last 3 months of the financial year 2005-2006 being already covered by WorkChoices (which came into effect on 27 March 2006). Controversy over WorkChoices heated up in the second half of 2005, when the reforms were enacted, and the drop in lodgements may perhaps also reflects employees of small and medium enterprises anticipating that their applications, even though still lodged under the WRA regime, would now be less likely to succeed.

The number of cases lodged then fell sharply to 5173 in the first full *WorkChoices* year 2006-7. Compared to the *Workplace Relations Act* the most economically significant changes with *WorkChoices* were increased coverage of Federal jurisdiction (through invoking the Commonwealth's constitutional corporations power), excluding claims against small businesses (defined as employing less than a hundred workers), and excluding claims for dismissals that could be attributed to "genuine operational reasons" (a far stronger exclusion than the *Workplace Relations Act* redundancy test that the job was no longer being performed by anyone).

The sharp fall in unfair dismissal claims under *WorkChoices* despite the increase in Federal coverage indicates the significance of these exclusions, particularly the small business exclusion. This is underlined by the subsequent more than doubling of unfair dismissal claims in the first full year of operation of the *FairWork Act* 2010-11 to around 12,000 and rising to between 14,000 and 15,000 annual cases afterwards. Thus, the number of overall applications pre- and post-*WorkChoices* exhibits similar levels, the main difference lying in the composition

of Federal cases and State cases (the latter shrinking from about fifty percent of all cases prior to *WorkChoices*, to only 4 percent in the period after WorkChoices).

If we look at the growth rate in cases lodged, and excluding year 2005-2006 which contains 3 months of *WorkChoices* applications, the average annual rate of applications declines by 5 percent over the 2001-2005 period of the *Workplace Relations Act*, by a considerable 57 percent in the first year of *WorkChoices* (but grows by 16 and 31 percent in the two following years), and increases at an annual average rate of 6 percent over the *Fair Work* years. These changes induced by statutory reforms are to be contrasted with average annual growth rates in the Australian labour force of 1.9 percent, 2.6 percent and 1.4 percent, respectively, for the three periods considered. Natural growth in the labour force therefore explains little of the observed variation in claims lodged.

The other big change with the *FairWork Act* has been the steady rise in claims under the new General Protection provisions. These have almost quadrupled from 1,188 in the first *FairWork* year 2009-10 to 4,117 in 2017-8. This rise reflects the attractiveness of a general protections claim for employees, with a reverse onus of proof and uncapped compensation. Judging by advertisements from lawyers seeking general protections business it has been an advantageous provision of the *FairWork Act* for them too.

These overall trends in lodgements, derived from Tables 1a and 1b are illustrated in Figure 2A.

[Take in Figure 2A]

Overall, we are seeing a modest rise in lodgements over the period 2000-2018, interrupted by the WorkChoices years when lodgements declined with the net reduction in coverage under that regime. This observed trend takes account of lodgements with State courts, and of growth of the labour force over the period, and we have separated out the recent rapid growth of general protections claims.

Turning from claims lodged to their method of resolution, it is striking how many unfair dismissal cases are settled through conciliation, with only about 6% of cases (see Table 1b) going to arbitration during the *Workplace Relations Act* years, rising to about 10% during the *WorkChoices* years, and then returning to 6% in the *Fair Work* years. Several trends in the data are worth commenting. From 2009-10 (the first *Fair Work* year) the number of cases lodged

and finalised in a reporting year doubles relative to the *WorkChoices* and *Workplace Relations Act* years. This reflects *Fair Work's* extended coverage and removal of prior exclusions as discussed in section 3. The conciliation rate, a stable 80-85% under the previous two regimes, falls to 75% under Fair Work and stays below 75% for the last 6 years of reporting (see 2nd column of Table 1b).

Finally, one would expect the number of cases resolved by arbitration to increase in line with the rise in lodgements from 2009-10 onwards. Yet, no increase is apparent until year 2013-14 when the overall number of arbitrations rises and keeps rising in subsequent years. This cannot be explained either by changing trends in general protections claims, which rise gradually and steadily over the *Fair Work* period. In the next subsection, we delve deeper into the possible reasons for this break in the data but we note at this point that more claims that would have been rejected on jurisdictional grounds in preceding years, seem to have been allowed to proceed to arbitration in 2013-14 relative to previous years.

What explains the rise in jurisdictional decisions after 2013? In 2012, the Australian Parliament passed the *FairWork Amendment Act 2012*, which came into force on 28 June 2013. The amendments are rather minor: they realign the time limit for making claims involving dismissal under unfair dismissal (14 days) and general protections (60 days) to 21 days, and extend the powers of the Commission to dismiss an unfair dismissal application if the claimant has unreasonably failed to attend a conference or hearing or failed to comply with a direction or order to do with the claim (the amendment also renames Fair Work Australia the Fair Work Commission). The Commission comments briefly on its use of these provisions: "These [jurisdictional] matters also were directed to a Commission Member who made a decision about allowing an extension of the statutory timeframe prior to arranging a voluntary conciliation conference or requiring a decision on the merits of the case. This resulted in a significant increase in the number of jurisdictional decisions" (FWC, 2015). An analysis of jurisdictional data in the annual reports suggest that the use of these extra powers explains at most half of the jump in jurisdictional arbitrations. It does not explain why so many jurisdictional decisions were deemed worthy of arbitration after 2013.

Some evidence that more claims of doubtful validity are being allowed to proceed comes from comparison of annual reports with our database of cases arbitrated on substance, procedure and on purely jurisdictional grounds. Table 1c provides a summary of our database's caseload coverage over the three unfair dismissal regimes.

[Take in Table 1c]

For the *Workplace Relations Act* years till 2006 our database covers approximately 34 percent of all arbitrations in the Commission's annual reports, for *WorkChoices* from 2006-9 it is 12 percent, and for the Fair Work years from 2009 until the start of 2015 it is about 43 percent. Our database records outcomes of arbitrations on merit, which is a corollary of the type of decisions the Commission releases. Jurisdictional arbitrations are generally either left unpublished or, when published, provide very little information. Narrowing our focus to the cases arbitrated on merit our database covers 74 percent of all cases (62 percent of all WRA cases, 85 percent of all WCH cases and 82 percent of all FWA cases).

Why might more unfair dismissal claims lodged of doubtful jurisdictional validity be accepted by the Commission? There are several possible reasons. Firstly, the claimant success rate which can be calculated from lodgement and outcome data reported by the Commission is politically sensitive, attracting press coverage and criticism of the Commission and government from business groups. Secondly, in the absence of reliable effectiveness measures for the public sector, the Commission like most public sector agencies benchmarks itself as an effective organization based on activity and timeliness. Allowing more of the doubtful claims lodged to proceed helps the activity measure, and presumably the timeliness measure, as these cases can then be quickly dismissed at arbitration. There is some evidence as presented above that is consistent with the hypothesis that administrative changes rather than the legal rules are driving the lodgement and resolution data, but we don't know enough about administrative procedures at the Commission over the relevant period to be sure.

Table 1b also shows the proportion of *Fair Work Act* general protections claims that were unable to be resolved by the *Fair Work Commission* ranged from 25%-41%, but we have no data on whether these cases progressed further to the Federal Court, or their resolution either by settlement or Federal court order. Given the high cost of Federal Court proceedings many may have been settled out of court.

(b) Claimant Success Rates

We have calculated claimant success rates for cases which went to arbitration based on data in the annual reports of the *Fair Work Commission* and predecessors, in Table 2, and for our database of arbitrated cases in Table 3.

[Take in Table 2]

The success rate is the ratio of claimant successes over the total number of cases arbitrated on merit (substance, procedure or both, excluding jurisdictional decisions). The success rate reported in the Commission's annual reports (Table 2) varies between 43% and 55% for the *Workplace Relations Act* years, falling to a low of 38% in the last *WorkChoices* year 2008-9, and varying between 35% and 60% during the *FairWork* years. Average success rates under the three regimes are 48% for the *Workplace Relations Act*, 43% for *WorkChoices*, and 50% for *FairWork*. Thus, the sharp rise in the number of cases going to arbitration after 2013 did not markedly affect employee success rates in the later years, remembering that the way we have calculated success rates removes the effect of cases dismissed at arbitration on jurisdictional decisions, and thus any influence of changes in administrative procedures around lodgement.

Success rates for cases in our database are reported in Table 3. They are calculated only for substantively and procedurally arbitrated cases and therefore do not suffer from the artificial break in the annual report data discussed above. Average success rates for cases in our database are 54% for the *Workplace Relations Act*, 35% for *WorkChoices*, and 45% for *FairWork.*[5]

[Take in Table 3]

Since our database does not contain unpublished cases for which disclosure is considered sensitive our claimant success rates at arbitration could differ from those calculated from annual reports data if there are systematic biases in the type of cases that are not published. Bias would be indicated by a consistent difference between the success rates for cases in the *Fair Work Commission* annual reports and cases in our database. However, claimant success rate for our databases' WRA cases is 54% compared to the annual reports' 48%, but for *WorkChoices* the pattern is reversed, 35% to 43%, whereas there are no marked differences for *Fair Work*. Aggregating claimant success rates across all three regimes yields a similar figure of 47-48% for our data base and the annual reports, suggesting there is no systematic bias in success rates coming from some cases not being publicly released by the Commission.

The overall trend in success rates are illustrated in Figure 2B:

[Take in Figure 2B]

There is less variation in the success rates at arbitration across the three regimes than the shrill rhetoric around dismissal regulation would suggest. *WorkChoices* certainly had a lower success rate than the *WRA's* and *FairWork* but a careful comparison of outcomes from merit arbitration reveals no large differences between the three regimes.

We must remember that these arbitration outcomes are a small proportion of cases lodged; most are resolved through conciliation. What part of the distribution of cases are we seeing when we record outcomes of cases arbitrated on merit in our database? We believe that we are seeing the middle part of the distribution of cases by probability of claimant success, in other words cases where the parties are unsure what the outcome will be. This is consistent with the reported arbitration success rates of 34-60% depending on the year and the regime (see Table 2). Allowing a case to proceed to arbitration means the details are likely to be released publicly, potentially embarrassing employees or employers. This means there is an incentive to settle such cases before arbitration, removing them from our sample of cases. There is likely to be a correlation between embarrassing details for one of the parties and that party having a low likelihood of success at arbitration, removing cases with very high and very low probability of claimant success from the distribution. The direction of bias in the success rate will depend on whether employee concern about embarrassing details (harming their future employment prospects) is more powerful than employer concerns (harming reputation of the business). If employer embarrassment is more powerful than employee embarrassment we would expect higher probability of claimant success cases to be settled before arbitration, pushing the arbitration claimant success rate down. Claimant success rates were below 50% up until about ten years ago when they rose to nearly 60%. Do employees now have more to lose reputationally from an adverse and public finding at arbitration? Perhaps the ease of searching cases on the internet and the rise of social media has increased the reputational damage from unfair dismissal cases for employees in recent years[6]. This bias coming from our sample (being the arbitrated cases) may be influencing success rates as well as changes in the policy regime.

As we have observed the main changes between the regimes were to eligibility, and these can affect success rates for arbitrated outcomes. The lower employee success rate observed during *WorkChoices* may owe to its small business exemption. WorkChoices removed many small business cases that employees were likely to win because small businesses are often less careful in their HR practices than large businesses, and lack the resources to fight claims effectively in

the courts. *WorkChoices* also removed as redundancies many cases where an operational reason could be given for the dismissal, and anecdotal evidence suggests this was invoked by employers in cases they thought they had little chance of winning on substantive grounds. Another explanation might be procedural or court personnel changes under the influence of the government which introduced *WorkChoices*[7].

Overall though changes in the average claimant success rates are modest, with the main changes resulting from the censoring of the distribution of claims from changes in coverage under the three regimes.

The only similar research that has been conducted internationally is Colvin (2011) who examined 3945 arbitrations, including 1213 which involved awards to employees in the period 2003-7. Although these come from filings under California State Law by the American Arbitration Association, they are not all Californian cases. The win rate (defined as an award which included any monetary payment to the employee) was 21.4%. This is much lower than the Australian employee win rate at arbitration, which is hardly surprising because the basis of the claims is different. In Australia the Commission determines whether a dismissal is "harsh, unjust or unreasonable" while the US cases tend to be about whether there is an actual or implied breach of contract, whether company procedures have been followed, or other procedural matters.

(c) Remedies

Table 4 based on *Fair Work Commission* annual reports and Table 5 from our database indicate that under all three regimes compensation is a much more common remedy than reinstatement. For cases arbitrated on merit in our database compensation is awarded about twice as often as reinstatement, and most of these reinstatements also involve compensation for lost remuneration. Remember that these arbitrated cases are a small proportion of cases resolved and almost all conciliations involve compensation rather than reinstatement.

[Take in Table 4]

We have very limited information on amounts agreed for conciliation settlements as the individual data is not released by the Commission, and so cannot be included in our database of cases. However, the Commission has released in its annual reports some aggregate

information about amounts of conciliation settlements for the most recent *Fair Work* years, and this information is collated in Table 4. For unfair dismissal cases resolved by conciliation the amounts average around 10% of annual wages for each of the *Fair Work* years. For unfair dismissal cases resolved by arbitration average payments are higher at around 20% of annual wages for the *Fair Work* years. The difference may be due to payment of relatively small amounts of "go away money" at conciliation in cases of little merit, which would depress average conciliation payments compared to arbitration payments. Reassuringly this is almost identical to the Table 5 amount of 20% of annual wages for Fair Work unfair dismissal cases in our database resolved by arbitration. As discussed earlier, general protections cases are resolved differently, and the annual reports give average payouts for cases conciliated by the Fair Work Commission of between 16-18% of annual wages. No information is available about payouts if general protections cases unable to be resolved by the Commission are subsequently settled or proceed to the Federal Court.

Our database, unlike the annual reports allows us to compare compensation payments for the three regimes. Table 5 indicates average compensation awarded to successful employees varies little between the three regimes, consistent with the rules regarding the determination of compensation payments not changing.

[Take in Table 5]

To investigate the compensation outcomes further we estimated the density functions of compensation awards in our database under each of the three regulatory regimes using non-parametric kernel (Gaussian) histogram-smoothing methods. Since compensation payments are capped at 6 months of annual wage, our choice of kernel bandwidth could be done without particular concern for losing outliers or any other unusual aspects of the data[8]. The Gaussian density functions are presented below, in figure 2.

[Take in Figure 2]

The somewhat similar distributions of compensation awards under the *Workplace Relations Act, WorkChoices, and FairWork* confirms the similarities between compensation parameters under the three regimes reported in Tables 4 and 5, and our hypothesis that as far as unfair dismissal arbitration is concerned, the main impact of the *WorkChoices* changes was on success rates, operating through coverage and jurisdictional exemptions.

One pattern that is clear in all three estimated density functions is the bunching of payouts around one month and, to a lesser degree, just below the 6 months cap. Our findings raise the question of how judges actually determine compensation amounts, and this requires further investigation of the legal conventions.

Figure 2C illustrates the lack of change in compensation awards under the three regimes, drawing on our database which is the only comparative data available on compensation across the three regimes:

[Take in Figure 2C]

We can compare the payouts to the US results in Colvin (2011), remembering that the basis of action in the US is usually procedural defects rather than unfairness, and the US arbitrators do not work within legislated caps on amounts. US awards to dismissed employees had a median of US$26,500 and a mean of US$109,856 with a very large standard deviation, which the author comments reflects the skewness of the distribution. Average annual earnings in the middle of the study period 2005 were approximately US$60,000 so this translates to a median of about 6 months earnings and a mean of about 2 years wages. These are much higher amounts than the Australian payouts, and though the basis of the claim in the US is different the payouts in both countries are meant to represent economic loss, so comparison with the US highlights the issue of how Australian judges are determining payout amounts, bunching well short of the legislated cap.

6. Conclusions

This paper has compared patterns of unfair dismissal claims, methods of resolution, and remedies under the *FairWork* Act, *WorkChoices* and the *Workplace Relations Act* legal regimes. Claims have increased over that time spans, interrupted by a significant drop under *WorkChoices*. The average employee success rate at arbitration has remained steady across *FairWork* and *Workplace Relations Act* cases but dipped slightly during the *WorkChoices* years. This is most likely due to exclusion under *WorkChoices* of many small business cases (which are often procedural and easier to win for employees) and to a smaller extent exclusion of cases where an operational reason could be given (which would otherwise also more likely be wins for employees). It is a story of legislative changes in coverage censoring the distribution

of cases brought to the Commission, more than changes in the rules under which the Commission operates. Differences between average compensation awarded to dismissed employees under the three regimes are not large, as one might expect with unchanged legal rules for determining compensation once cases get to arbitration, and compensation capped at six months under all three regimes. Institutional details and procedures seem to matter as much as the controversial and fairly major policy changes.

There is no evidence to suggest that revisions are necessary to conclusions of Freyens and Oslington (2007) and Freyens and Oslington (2013) that the costs imposed on business and the impact on aggregate employment of unfair dismissal regulation are small. Those papers dealt with total costs of dismissal, drawing on large-scale surveys conducted by the authors, whereas here we are just considering the component that is likely to be affected by changes in the policy regime – the average amounts awarded or negotiated as compensation for unfair dismissal. If the expected costs to employers of unfair dismissal actions are indeed small as all this research is suggesting, then why is there so much agitation about unfair dismissal regulation? Are employers and the associations that represent them ignorant or playing some sort of stubborn political game? Or are employers more concerned about the uncertainty that unfair dismissal regulations add to the employment relationship than average payouts to workers. An alternative behavioural economics explanation is that employers are heavily weighting the large probability of low losses when making decisions. Concerns about fairness (Fehr et al., 2009) might be why dismissal regulations generate so much heat even though claimant success rates and payouts are quite modest. Employers don't like paying when they are in the right – and employees want to be vindicated if they have been treated badly.

Throughout our paper we have noted various gaps and problems with the Australian publicly available data on dismissals, even though unfair dismissal has been a hot political topic, and the Australian policy changes have attracted international attention. We need more information on cases that do not reach arbitration – especially the settlement amounts. It is encouraging to see the Fair Work Commission beginning to collect and release some information recently about these. The other big data gap is the resolution of the increasingly important General Protections cases, especially those that are not resolved by the Commission and are either settled or resolved by the Federal Court. Our conclusions make use of all the publicly available data, including the database we have constructed from transcripts of unfair dismissal cases under the three policy regimes. These conclusions are however limited by the gaps in the data.

A recurring theme in our investigation of the claims and payouts is that the institutional details and administrative procedures matter, a finding also of Colvin (2006). The effects of changes in the Commission's composition and procedures analysed by Booth and Freyens (2014) and Freyens and Gong (2017, 2020) appear to have had a greater impact on reported claimant success rates at arbitration than any of the politically contentious changes in unfair dismissal laws. The invariance of compensation amounts to large changes in unfair dismissal rules, and their bunching around particular amounts under all three regimes is another example. The introduction of seemingly innocuous general protections provisions into the Fair Work Act is having a huge impact on claims and their resolution, one that would benefit from further specific investigation. Another question that warrants further investigation is the processes Australian judges use to determine payouts[9], with our observations of bunching below the legislated cap and payouts being much lower on average than in the UK or in the US.

Endnotes

[1] A less ambitious precursor to *WorkChoices*, the Workplace Relations Legislation Amendment (*More Jobs, Better Pay*) Bill 1999 was repeatedly defeated in the Senate between 1997 and 2000 – see and Australian Government (1998, 2000) and Figgis (1998) for a review.

[2] Tracing the resolution of general protection cases unable to be resolved by the Fair Work Commission into Federal Court records might be a possible, but a huge project that is well beyond the scope of the present paper

[3] Freyens and Gong (2017) used the data to study the effect of commissioners' identity on the outcomes of cases decided by the Fair Work Commission and predecessor bodies. Chelliah and D'Netto (2006) constructed an earlier database of 343 cases from 1997-2000.

[4] We went to some lengths to be exhaustive in our analysis of substantively arbitrated cases, but we know some are missing. For instance, where commissioners make a decision against defendants but send the parties back to the negotiation table to determine the award and are asked to informally notify the commissioner about the final arrangement these cases do not reappear later in transcripts and are lost for our data set, but are nevertheless reported in annual reports. In addition, some of the cases reported in the aggregate statistics of the Annual Reports are not published. Although the Fair Work Act includes a general requirement that the Commission publish its decisions, it does allow the Commission to make an order prohibiting or restricting the publication of a decision -or part of a decision- if satisfied that it is desirable to do so because of the confidential nature of the evidence, or for any other reason. The

proportion of unpublished cases is unknown although table 1c (rightmost column) provides a ballpark estimate at around a quarter of all cases.

[5] The closeness of some of the reported success rates to 50% raises the issue of whether the same dynamics discussed by Priest & Klein (1984) are pulling success rates towards 50%. We used F-tests to check our database success rates against the 50% prediction of the Priest-Klein model, adjusted for the differences in periods covered. Except for the first three years (2001-4) employee success rates were significantly lower than 50% (until our last full reporting year 2013-14).

[6] The introduction of the Small Business Dismissal Code in 2009 may have also had an influence on these statistics reported by the *Fair Work Commission*. Small businesses tend to be less aware of legal requirements around dismissal and less able to defend themselves against claims of procedural unfairness, which lifts the claimant success rates. So, taking many small business cases out of the population of cases through the introduction of the Code would tend to reduce the reported claimant success rate. We believe the explanation given in the main text for the fall in the reported success rate to be more important because the trend began before the introduction of the Code

[7] The effect on decisions of procedure and the composition of court personnel has been previously analysed in Booth and Freyens (2014) and Freyens and Gong (2017)

[8] The kernel graphs in figure 3 were built by selecting pre-recorded routines in R (Wessa, 2011) to assign weights to all observations in the vicinity of each compensation value and derived the conditional expectation graph for our relative measure of compensatory payment. Note the presence of a dozen outliers under the WRA years. Which extend the X-axis to 0.8 (when technically 0.5 is the statutory limit for compensation payments under all the three regulatory regimes). There are *ad hoc* reasons for these outliers (in one case a commissioner awarded extra-statutory compensation for 'extreme humiliation') but discretionary decisions of this type disappear with the onset of *WorkChoices*.

[9] Another question is what the appropriate level of compensation for an unfair dismissal should be. Oslington (2020) investigated this question using an economic model of expected earnings and found that the compensation awarded by the Fair Work Commission and predecessor bodies is typically much less than expected economic losses borne by dismissed workers. This seems to come partly from the inability of the legal rules, based on the benchmark Sprigg case, to capture the economic losses, and the tendency of legal conventions to bunch payouts, which we believe explain the patterns evident in Figure 3.

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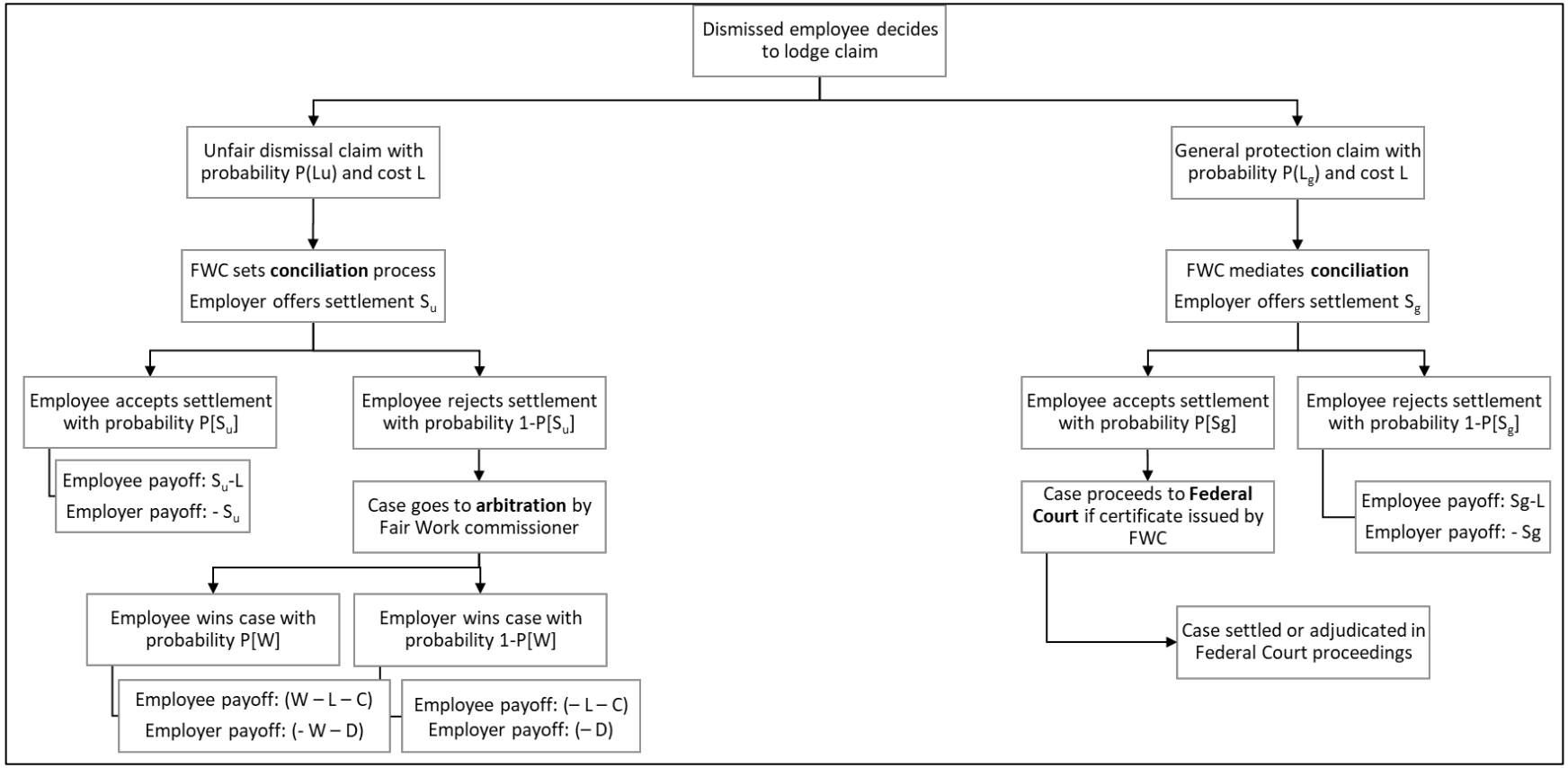
TABLES AND FIGURES

Figure 1. Commission procedures to finalize dismissal claims



Notes: Note that we have values for some but not all of these variables from our study and other publicly available data: Lodgement cost L = fee $71 plus estimate of admin time $300 = 0.01 of annual wage. Unfair Dismissal Claim Lodgement Proportion P(Lu) = lodgements from Table 1a for 2013/4 divided by dismissals from ABS 6105.0 July 2014 = 14,797/ 381,000 = 0.04. Unfair Dismissal Average Settlement Su = 0.10 of annual wage from table 4. Unfair Dismissal Proportion of Claims Settled P(Su) = 0.94 from table 1b. Unfair Dismissal Average Arbitration Payout W = 0.19 of annual wage from table 4. Unfair Dismissal Worker Success Rate at Arbitration P(W) = 0.47 from table 2. Unfair Dismissal Arbitration Cost to Firm D = 0.36 from Freyens/Oslington 2007 table 1. General Protections Lodgement Proportion = Table 1b for 2013/4 divided by dismissals P(Lg) =2,879/381,000 = 0.01. General Protections Average Settlement Sg = 0.16 of annual wage from table 4. General Protections Proportion of Claims Settled P(Sg) = 0.67 from table 1b. No data is available on the Unfair Dismissal Arbitration Cost to Worker C or the Expected General Protections Payoff F if the case goes to the Federal Court.

Figure 2a - Lodgements

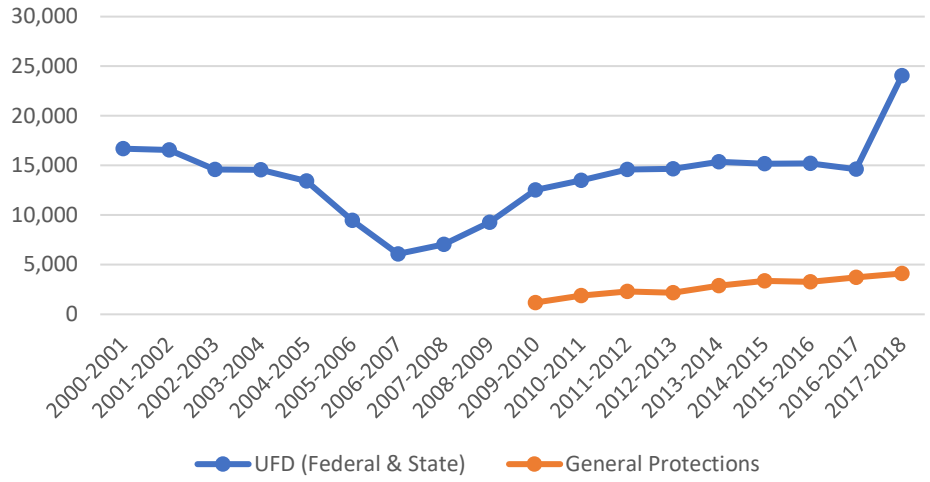


Figure 2b - UFD Arbitration Success Rate (from FWC reports)

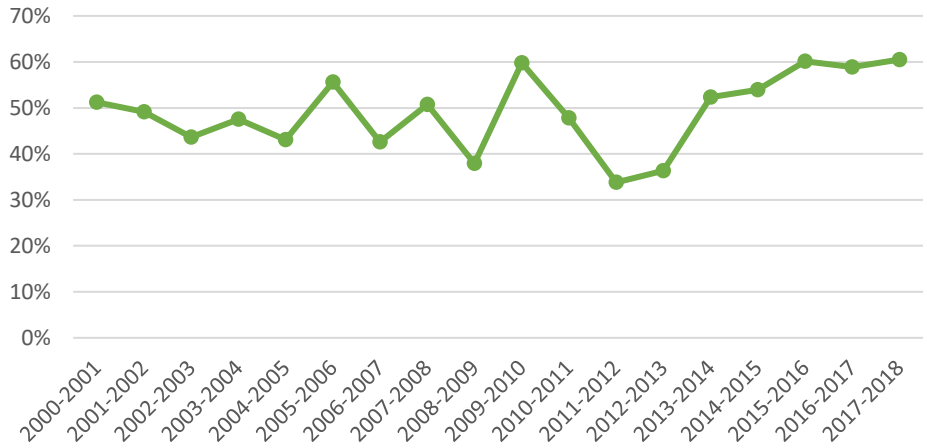


FIgure 2c - UFD Arbitration Payouts - Averaged over Regimes (% of annual wage)

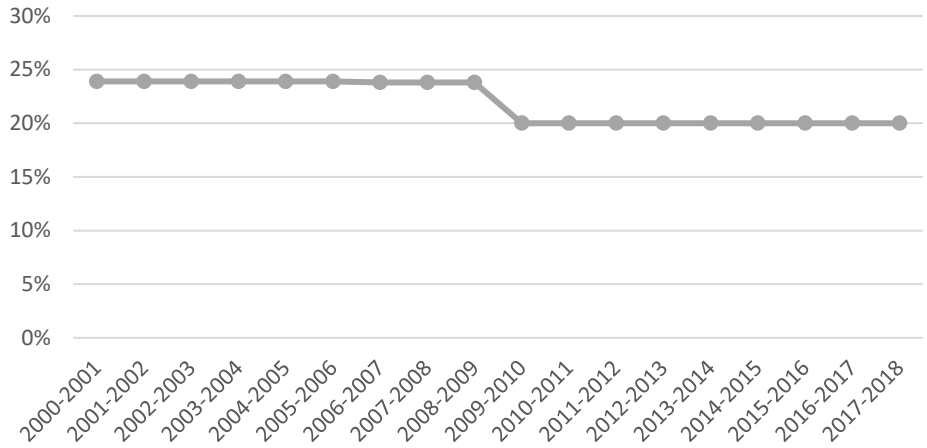
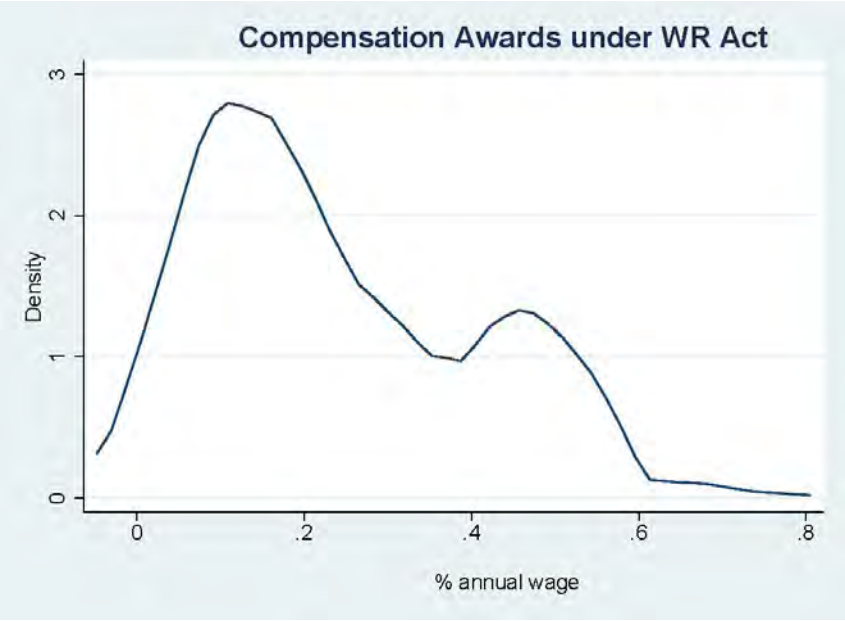
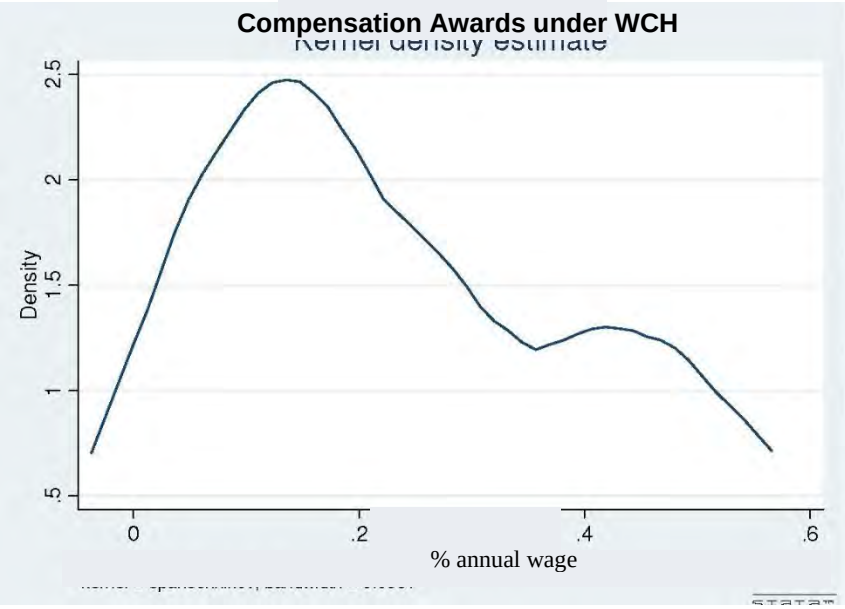


Figure 3 – Kernel Estimates of Compensation Awards under Different Regimes





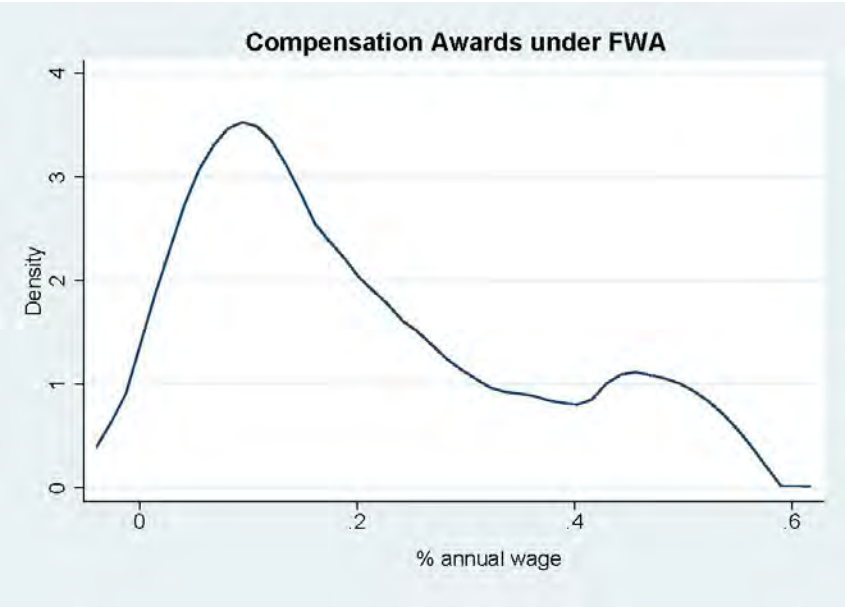


Table 1a –Unfair Dismissal claims lodged and finalised under Federal and State jurisdictions (from the annual reports of Federal and State Industrial Relations Commissions)

	FEDERAL CASES		STATES CASES		ALL CASES		COVERAGE
WRA	Cases lodged	Cases finalised	Cases lodged	Cases finalised	Cases lodged	Cases finalised	(Federal cases as % of all cases)
2000-2001	8,109	7,809	8,571	8,283	16,680	16,092	0.49
2001-2002	7461	8,658	7,919	7,852	16,577	16,510	0.52
2002-2003	7,121	7,326	7,481	7,766	14,602	15,092	0.49
2003-2004	7,044	7,125	7,505	8,194	14,549	15,319	0.48
2004-2005	6,707	6,841	6,728	7,073	13,435	13,914	0.50
2005-2006	5,758	6,006	3,711	4,980	9,469	10,986	0.61
mean	*7,233*	*7,294*	*6,986*	*7,358*	*14,218*	*14,652*	*0.51*
WCH							
2006-2007	5,173	5,531	915	1,256	6,088	6,787	0.85
2007-2008	6,067	6,281	981	924	7,048	7,205	0.86
2008-2009	7,994	6,980	1,269	1,258	9,263	8,238	0.86
2009-2010	:	2,200	:	:	:	:	:
2010-2011	:	97	:	:	:	:	:
mean	*6,411*	*6,264*	*1,055*	*1,146*	*7,466*	*7,410*	*0.86*
FWA							
2009-2010	11,866	9,369	662	711	12,528	12,280	0.95
2010-2011	13,026	12,301	459	495	13,485	12,290	0.97
2011-2012	14,027	14,063	564	564	14,591	14,627	0.96
2012-2013	14,072	13,945	571	634	14,643	14,579	0.96
2013-2014	14,797	14,648	584	539	15,381	15,187	0.96
2014-2015	14,624	15,177	549	596	15,173	15,773	0.96
2015-2016	14,694	15,028	507	442	15,201	15,470	0.97
2016-2017	14,135	14,587	495	397	14,630	14,984	0.97
2017-2018	23,545	13,415	485	461	24,030	13,876	0.98
mean	*14,976*	*13,626*	*542*	*537*	*15,518*	*14,418*	*0.96*

Notes: cases lodged in (and finalised by) State jurisdictions are not subject to WRA, WCH and FWA/FWC statutory obligations but rather to the relevant Acts legislated by State Parliaments. Appearance of State data under WRA, WCH and FWA headings is only meant to facilitate year on year comparison with Federal data. Since 1996, the Industrial relations Commission of the State of New South Wales (NSW) reports data using calendar years, unlike the FWC and other State jurisdictions, which use financial years. The Queensland Industrial Relations Commission (QIRC) reports all unfair dismissal applications under a "reinstatements" category, including all cases where the applicant is not seeking reinstatement as remedy. The QIRC does not report figures for cases finalised, which had to be imputed using ratios of lodgements to finalisation in other states. The Western Australian Industrial Relations Commission reports applications made for unfair dismissal and denial of contractual benefit. These applications are known as "Section 29 applications" (the relevant section of the *Industrial Relations Act 1979* authorizing claims alleging unfair dismissal (s29(1)(b)i), claims alleging a denied contractual benefit (s29(1)(b)ii), and claims alleging a combination of both in the same application. We only used figures for s29(1)(b)i applications, ignoring applications involving a combination of unfair dismissal and denied benefit. Note also that The Western Australian *Industrial Relations Act 1979* was extensively amended by the *Labour Relations Reform Act 2002* which, among other reforms, significantly realigned procedures for arbitrating unfair dismissal legislation with procedures used in Federal and other States jurisdictions. Data for the states of South Australia and Tasmania are no longer reported and were estimated based on other states data on the pro-rata on their population weight (about 9 percent of the overall population). Data for the State of Victoria, and the two Territories of ACT and Northern territory are reported under Federal data since 1997.

Table 1b – Unfair Dismissal and General Protections claims finalised under Federal jurisdiction and method of resolution (from FWC annual reports)

	UNFAIR DISMISSAL				GENERAL PROTECTIONS			
WRA	Cases finalised	Resolved prior to or by conciliation (% of finalised)	Resolved post conciliation but pre-arbitration	Resolved by Arbitration (% of finalised)	Cases lodged	Cases finalised	Resolved by conciliation	Not Resolved Certificate Issued
2000-2001	7,809	6,096 (78%)	1,422	505 (6%)	:	:	:	:
2001-2002	8,658	6,719 (78%)	1,648	552 (6%)	:	:	:	:
2002-2003	7,326	5,876 (80%)	1,209	482 (7%)	:	:	:	:
2003-2004	7,125	5,763 (81%)	1,139	429 (6%)	:	:	:	:
2004-2005	6,841	5,654 (83%)	985	363 (5%)	:	:	:	:
2005-2006	6,006	4,739 (79%)	1,143	314 (5%)	:	:	:	:
Total	43,765	34,847 (80%)	7,546	2,645 (6%)				
WCH								
2006-2007	5,531	4,508 (82%)	922	458 (8%)	:	:	:	:
2007-2008	6,281	5,282 (84%)	930	600 (10%)	:	:	:	:
2008-2009	6,980	5,972 (86%)	913	693 (10%)	:	:	:	:
2009-2010	2,200	1,750 (80%)	395	296 (13%)	:	:	:	:
2010-2011	97			10 (10%)	:	:	:	:
Total	21,089	17,512 (83%)	3,160	2,057 (10%)	:	:	:	:
FWA								
2009-2010	9,369	8,897 (95%)	385	196 (2%)	1,188	1,176	:	:
2010-2011	12,398	9,869 (80%)	2,122	517 (4%)	1,871	1,944	1,294 (67%)	650 (33%)
2011-2012	14,063	11,410 (81%)	3,002	551 (4%)	2.303	2,268	1,393 (61%)	931 (41%)
2012-2013	13, 945	8,843 (63%)	2,143	660 (5%)	2,162	2,349	1,617 (69%)	832 (35%)
2013-2014	14,648	10,942 (75%)	2,506	1,200 (8%)	2,879	2,778	1,811 (65%)	967 (35%)
2014-2015	15, 177	10,944 (72%)	2,706	1,527 (10%)	3,382	3,475	2,402 (69%)	1,073 (31%)
2015-2016	15,028	10,659 (71%)	2,912	1,457 (10%)	3,270	3,060	2,305 (75%)	755 (25%)
2016-2017	14,587	11,341 (78%)	2,218	1,030 (7%)	3,729	3,564	2,659 (75%)	905 (25%)
2017-2018	13,415	8,285 (62%)	4,351	779 (6%)	4,117	4,358	3,181 (73%)	1,177 (27%)
Total	122,630	91,190 (74%)	22,740	7917 (6%)	22,260	24,972	16,662 (67%)	7,290 (29%)

Note: information is reported for financial years starting on July 1st and ending on June 30th of the following year. Cases may not be lodged and finalized in the same year. Percentage are derived with respect to finalized cases. For reporting years 2009-10 and 2010-11, annual reports of the Fair Work Commission tease out cases decided under WorkChoices (WCH) from those decided under the Fair Work Act (FWA). This breakdown is however not available for the years 2006-7 and 2007-8 so figures presented under WCH are presumed to contain an unknown number of WRA cases for these years. In the note to Figure 1b we explain how we have imputed the missing figures for WRA cases in the WCH reporting years.

Note that under the Fair Work Act there are two ways of pursuing a dismissal claim. An unfair dismissal claim can be lodged under s394 of the Fair Work Act, or a General Protection cases lodged under s365 & s773. Unlawful terminations are covered by s772 but workers cannot make an unlawful termination action if they are entitled to make a general protections application. For unfair dismissal outcomes, "resolved by conciliation" includes cases settled prior to- or at conciliation. From 2013-14 the reporting of arbitrated cases changed and some of the cases previously reported as "resolved post conciliation but prior to arbitration" are now included in "resolved by arbitration". These cases consist almost exclusively of cases dismissed on a number of jurisdictional grounds, and they account for the surge in the number of arbitrated cases observable from 2013-14 onward. For general protections cases the Commission must attempt to conciliate the dispute, but if there is no resolution it issues a certificate to that effect and it may be pursued in the Federal Court. From January 2014 the Commission has offered consent arbitration after a certificate was issued, but take-up by the parties has been very low.

Table 1c – Database coverage of cases reported in FWC annual reports

WRA	Database: all Arbitrated cases	Annual reports: all arbitrated cases	Database Coverage of all reported arbitrated cases	Database: cases arbitrated on merit	Annual reports: cases arbitrated on merit	Database Coverage of all reported cases arbitrated on merit
01/01/01-26/03/06	900	2,645	0.34	792	1,281	0.62
WCH						
27/03/06-30/06/09	247	2,057	0.12	229	270	0.85
FWA						
01/07/09-30/01/15	1,729	4,015	0.43	1,341	1,643	0.82
Total	**2,876**	**8,717**	**0.33**	**2,362**	**3,194**	**0.74**

Note: The Fair Work Commission offers no break down between WRA and WCH cases in its annual reporting. 54 WRA cases in our database were decided in the (mostly WorkChoices) 2006-7 and 2007-8 reporting years. They have been re-allocated to the WRA aggregates in both data sets. We found no occurrence of WCH cases decided in the WRA reporting year 2005-6.

Table 2 – Outcomes of Arbitrated Unfair Dismissal Cases (from FWC annual reports)

WRA	Arbitrated	Arbitrated on merit (% of finalised)	Award: Compensation	Reinstatement (with damage award)	Dismissed on merit	Dismissed/ jurisdiction	Success rate
2000-2001	505	290 (4%)	96	42	141	214	51.2%
2001-2002	552	291 (3%)	96	47	148	261	49.1%
2002-2003	482	241 (3%)	81	24	136	241	43.6%
2003-2004	429	223 (3%)	84	22	117	206	47.5%
2004-2005	363	202 (3%)	69	18	115	161	43.1%
2005-2006	314	124 (2%)	52	17	55	190	55.6%
Total WRA	**2645**	**1372 (3%)**	**478**	**170**	**724**	**1273**	**48.1%**
WCH							
2006-2007	458	101 (2%)	35	8	58	357	42.6%
2007-2008	600	69 (1%)	17	18	34	531	50.7%
2008-2009	693	95 (1%)	22	14	59	598	37.9%
2009-2010	296	55 (3%)	16	7	32	241	41.8%
2010-2011	10	3 (3%)	3	0	0	7	:
Total WCH	**2057**	**323 (2%)**	**93**	**47**	**183**	**1734**	**43.3%**
FWA							
2009-2010	196	87 (1%)	35	15	37	109	59.8%
2010-2011	517	316 3%)	122	25	169	201	47.8%
2011-2012	551	325 (2%)	85	17 (11)	223	226	33.8%
2012-2013	660	402 (3%)	112	20 (12)	270	258	36.3%
2013-2014	1200	367 (3%)	150	34 (25)	183	833	52.3%
2014-2015	1527	349 (2%)	141	37 (25)	171	1178	53.9%
2015-2016	1457	326 (2%)	135	54 (42)	137	1131	60.1%
2016-2017	1030	309 (2%)	135	41 (31)	133	721	58.9%
2017-2018	779	263 (2%)	110	42 (36)	111	516	60.5%
Total FWA	**7917**	**2744** (2%)	**1025**	**285**	**1434**	**5058**	**50.1%**
Total	**12619**	**4439 (2%)**	**1596**	**502**	**2341**	**8065**	**47.2%**

Note that cases "dismissed on merit" includes dismissal found to be fair, consistent with the small business fair dismissal code, or a genuine redundancy; whereas cases "dismissed on jurisdiction" include cases lodged out of time, frivolous, vexatious or with no reasonable prospect of success, or not covered by unfair dismissal law for a dozen of reasons including minimum employment periods and high income thresholds. Where compensation is paid for lost remuneration in a reinstatement case, the case is included in the reinstatement total. The success rate is calculated as [Compensation + Reinstatement] / [Arbitrations on merit]

Table 3 – Outcomes of Cases Arbitrated on Merit (from our database of cases)

WRA	Arbitrated	Arbitrated on merit	Compensation	Reinstatement (with damage)	Dismissed on merit	Dismissed/ jurisdiction	Success rate
Jan 2001 – Mar 2006	900	792	311	114 (103)	367	108	53.7%
WCH							
Mar 2006-Jun 2009	247	229	51	30 (26)	148	18	35.4%
FWA							
Jul 2009-Jan 2015	1729	1341	495	111 (111)	735	388	45.2%
Total	**2876**	**2362**	**857**	**255 (240)**	**1250**	**514**	47.1%

Table 4 – Compensation Payouts (from annual reports)

	Unfair dismissals resolved by conciliation: Settlements			Unfair dismissals resolved by Arbitration: Compensation			General Protections resolved by Conciliation		
Year	Number	Average $	Average, % annual wage	Number	Average $	Average, % annual wage	Number	Average $	Average, % annual wage
2014-2015	6917	6,052	10%	137	11,387	19%	952	9,262	16%
2015-2016	6859	6,138	10%	133	12,808	22%	1134	10,761	18%
2016-2017	7194	6,177	10%	133	11,372	19%	1457	9,588	16%
2017-2018	6592	6,346	11%	104	10,490	18%	1792	9,367	16%

Note that the number of cases differ from figures 2 and 3 because payouts are sometimes not disclosed, especially under conciliation. In some cases, the payout amounts reported include unpaid leave entitlements.

Table 5 – Compensation and damages awards (from our database of cases)

	Compensation			**Reinstatement**		
WRA	Average payment - % of annual wage	Average payment - in weekly wage	Payment variance (in weekly wage)	Average damage award - % annual wage	Average damage award - in weekly wage	Damage variance (in weekly wage)
Jan 2001 – Mar 2006	23.9%	12.4	0.0269 (1.4)	38.8%	20.2	0.098 (5.1)
WCH						
Mar 2006-Jun 2009	23.8%	12.4	0.0248 (1.3)	22.0%	11.5	0.065 (3.4)
FWA						
Jul 2009-Jan 2015	20.0%	10.4	0.0223 (1.2)	30.9%	16.1	0.127 (6.6)
Total	**21.64%**	**11.2**	**0.0242 (1.3)**	**33.4%**	**17.3**	**0.1104 (5.7)**

Appendix: Comparison of unfair dismissal provisions under the Workplace Relations Act 1996, WorkChoices Amendment 2006 and under the Fair Work Act 2009

Statutory provisions	*Workplace Relations Act 1996*	*Workplace Relations Amendment Act 2005* [WorkChoices]	*Fair Work Act 2009*
Effective from	July 1st, 1996	March 26th, 2006	July 1st, 2009
Coverage of Employees by Federal Unfair Dismissal Laws[1]	60% (accounting for the share of employees covered by States jurisdictions, excl. Victoria and Territories)	48%	87%
Test for Unfair Dismissal	"harsh, unjust or unreasonable" Some dismissals also unlawful	same	same
Time Limit to Lodge Claims	21 days	21 days	14 days (returned to 21 days after 2012 Amendment)
Exclusion from Coverage based on Employer Size	No threshold	<100 employees (including employees of a related entity -as defined in the *Corporations Act 2001*)	<15 employees ,provided there was compliance with the *Small Business Fair Dismissal Code*.
Qualifying Employment Period for Claims	3 months	6 months	6 months for large firms 12 months for small business
Other Exclusions	▪ Casuals ▪ Contractors ▪ Trainees ▪ Fixed-term / fixed-task ▪ Non award employees earning > $65,000 indexed and inclusive of non-wage forms of remuneration	▪ Casuals ▪ Contractors ▪ Trainees ▪ Fixed-term employees ▪ Non award employees earning > $94,000 indexed .	▪ Casuals ▪ Contractors ▪ Trainees ▪ Fixed-term employees ▪ Non award employees earning >113K indexed not covered by award or agreement
Redundancy Definition	"job performed by no-one" Reluctance of courts to intervene in employer judgments about economic reasons for dismissal	"genuine operational reasons" No need for employer to show that this was the only reason, or that the operational reasons made the dismissal necessary	"genuine redundancy"
Remedies	Reinstatement. Compensation, capped at 6 months (half the annual wage)	Reinstatement. Compensation, capped at 6 months. (half the annual wage)	Reinstatement. Compensation, capped at 6 months. (half the annual wage)
General Protections	None	None	Dismissal claims possible under adverse action provisions of the *Fair Work Act.*

[1] For *WorkChoices* the percentage of the workforce covered by Federal unfair dismissal laws is sourced from the Department of Employment and Workplace Relations' own calculations (DEEWR, 2012 p293) accounting for exemptions) as per August 2008. The figure there for the *Fair Work Act* is 79% (DEEWR, 2012 p293) but we have used the more recent estimate fo87% rom the Australian Bureau of Statistics (ABS, 2018, "Workplace Relations" subheading www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/6102.0.55.001~Feb%202018~Main%20Features~Workplace%20Relations~12). For the *Workplace Relations Act 1996*, coverage is more complex to establish due to States and Federal unfair dismissal laws being 'in a state of flux' (Figgis, 1998). Ambiguous jurisdictional issues are also noted in Australian Government (1998) p.8: "It is, however, unclear just how many workers are presently covered by federal unfair dismissal laws…". We took estimates of the ratio of Federal to State coverage for NSW from Figgis (1998) and extended it to the States of Queensland, Western Australia, South Australia and Tasmania. Victoria had by then referred its unfair dismissal (and other industrial relations) powers to the Commonwealth. We then used ABS labour force data from December 1996 (ABS, 1996) to weigh the share of the workforce covered by the WRA Federal regime (100% for Victoria, ACT and NT, 45% for the five remaining States). As a referee emphasised coverage of employees by the Federal system is not the same as coverage by unfair dismissal regulation because of the continuing State systems. All of these estimates are imprecise because of patchiness of the underlying data.