1. Introduction

David Marsden has argued that the rise of the modern business enterprise relies on two great innovations: limited liability for companies and the employment relationship or, more accurately in legal terms, the contract of employment. This book provides a comparative study of the second of these two innovations, the contract of employment, in three common law jurisdictions: Britain, Australia and New Zealand. Our objective is to analyse the character of the common law of employment in those jurisdictions and in particular to examine the interrelationship between the contract of employment and the political, economic and social dynamics that have shaped the employment environment in each jurisdiction. These jurisdictions were chosen because they share a common English law heritage. Our intention is to explore the extent to which subsequent evolution has been homogenous and, insofar as it has not, why a variance has developed.

The contract of employment, Marsden argues, ‘revolutionized the organisation of labour services, providing firms and workers with a very flexible method of coordination and a platform for investing in skills’. The need for the flexible coordination of labour in industrial enterprises was not, however, new. Historically, that need had been met by punitive legislation, the immediate predecessor to the contract of employment being the master and servant acts, ‘one of the many legal ligaments that helped make the British Empire a thinkable whole’. Hay and Craven argue that master and servant legislation had three common characteristics: first, that the employment relation was a matter for private contract; second, that the provisions of that contract were summarily enforced by lay justices or magistrates; and, third, that the uncooperative worker was punished by punitive sanctions rather than sanctioned through the usual

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2 ibid 3.
The common law employment relationship

remedies for breach of contract. While the antecedents of these acts may have a long history, Deakin and Wilkinson make the important point that the master and servant acts were not an attempt to retain a pre-industrial model of household employment. Instead, they ‘were aimed to impose a more rigorous system of work discipline upon the growing number of labourers, artisans and outworkers employed in manufacturing’. Deakin and Wilkinson also make the point that master and servant law did not stand alone but was the centrepiece of a web of criminal law designed to enforce labour discipline against a wide range of workers.

While this punitive model of employment regulation had considerable advantages for employers, workers were less accepting and, as they gained a political and industrial voice through the course of the nineteenth century, the use of criminal sanctions to enforce employment obligations became increasingly unviable. In the United Kingdom the master and servant laws were repealed in 1875, although the power to fine for breaches of employment obligations continued for some time under the Employer and Workmen Act 1875. In Australia the various state Acts slowly fell into obsolescence and disuse before repeal. Attempts to enact domestic master and servant legislation failed in New Zealand.

Following the repeal of the master and servant acts, the foundation of the employment relationship became the law of contract, but a contract of an unusual character as the common law courts took the ‘leg’ of private contract and supported it by incorporating into contract the key features of the master and servant acts. This new contractual basis of employment had two major advantages for employers. First, the legal subordination of

4 ibid 1.
6 ibid 63–5.
7 Hay and Craven (n 3); Christopher Frank, Master and Servant Law: Chartists, Trade Unions, Radical Lawyers and the Magistracy in England, 1840–1865 (Ashgate 2010).
8 The Australian situation was more complicated as the various master and servant acts were enacted by the pre-Federation colonies and in some cases were not fully repealed until the 1930s.
9 John Henning, ‘New Zealand: An Antipodean Exception to the Master and Servant Rules’ (2007) 41 New Zealand Journal of History 62. Henning puts forward a number of reasons for this defeat, most notably the strong vision of New Zealand as a free-labour colony, but it is probably no coincidence that by the 1860s New Zealand had the most liberal franchise in the Empire.
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the employee to the employer's control – ensured through the implied obligation that employees obey all lawful orders and unilateral discipline through the power to dismiss without reasons – remained intact. Additionally, freedom of contract meant that, in the vast majority of situations, employers could dictate standardized terms of employment tailored to their perceived needs.

These contractual developments were complemented and reinforced by the judiciary's creative use of the economic torts to restrict virtually any form of collective action by, now legalized, trade unions that might interfere with or result in breaches of the contract of employment.\(^{10}\) Bargaining power was placed firmly in the hands of the first great innovation, the limited liability company.

Together these two developments delivered, to employers, a common law package that provided a continuation of the power dynamics of the master and servant era, albeit now using the vocabulary and techniques of private law rather than the criminal law. This book is largely concerned with the subsequent interplay between courts and legislatures in relation to these common law developments as each evolved their approaches in the light of domestic political, social and economic developments. Over time, the employment relationship became increasingly defined by this range of domestic influences, including the different statutory and collective bargaining regimes and the differing industrial relations and labour market structures of each country. Nevertheless, the contract of employment continues to provide the 'cornerstone'\(^{11}\) of the law of employment in all three jurisdictions and is one of the legal ligaments binding what is now the Commonwealth, together.

Viewed in retrospect, this fundamental transformation in labour law in the late nineteenth century occurred during a brief period of about two decades when politics, the law and the British Empire were also in a fluid state. By the last quarter of the nineteenth century the former colonies in Australia, along with New Zealand, had become increasingly independent of Britain, and in 1900 the Australian colonies federated to form the Commonwealth of Australia. Moreover, within both Australia and New Zealand the political forces at work differed considerably from those of Britain. Politically universal adult suffrage was achieved in New Zealand in 1893 and within the next decade in Australia. This, combined with the demographic structures that differentiated the settler societies from

\(^{10}\) Deakin and Wilkinson (n 5) 208.

Britain and, to some degree, from each other, saw the pattern and platforms of political parties also become increasingly differentiated. These domestic influences made it almost inevitable that variations in the law would emerge as the legislatures and the judiciary in each country responded to their own legal, political, economic and social context.

These influences were particularly marked in the area of labour law. In principle, while all three jurisdictions share a similar body of law as a result of their common law heritage, unlike more established areas of the common law such as contract or tort, labour law at the end of the nineteenth century was in a nascent form. This, and the fact that labour law is sensitive to economic and social forces, meant that the development of the law was susceptible to the domestic influences peculiar to each of the three jurisdictions. A number of such influences can be identified. First, the period covered by the book begins at a time when the political and legal systems of both Australia and New Zealand were increasingly diverging from those of Britain as both countries sought indigenous solutions to their own economic and social problems. It was also the period during which the Australian colonies and New Zealand became increasingly independent politically, accentuated in the case of Australia by federation in 1901.

In the context of these more general influences, at least two major influences on labour law can be identified. First, as universal suffrage became the norm, increased democratization challenged the historically embedded ideology of the relationship between employer and employee and set the stage for an important interplay between the common law and statute. As workers gained political power, they sought to utilize it to improve their working lives and the legal regimes under which work was performed, although their ability to achieve such change was often subject to the different social and political constraints within each jurisdiction. Second, and partly as a consequence of democratization as well as of differing social attitudes in each jurisdiction, was the enactment of different legislative regimes regulating the collective determination of employment conditions. In particular, the enactment of the arbitration system in New Zealand in 1894 and, federally, in Australia in 1904 acted as a major constraint on the influence of the common law for the best part of a century. More recently, the rise of neoliberalism and the resurgence of individualized employment relationships has seen the contract of employment assume a more influential role in regulating employment relationships and driving industrial relations reform, although this varied significantly both in timing and extent in each jurisdiction.
Deakin and Wilkinson rightly claim that: ‘Whatever its shortcomings the contract of employment remains at the core of the conceptual framework of modern labour law’. This remained true for all three jurisdictions even when, for long periods, its role may have been, to a greater or lesser extent, overshadowed by various statutory and collective regimes that regulated collective action and through which the terms and conditions of employment for the majority of the workforce were determined. Throughout this period, the role of the contract of employment might be described as silent but effective. Whatever the statutory regime, the gateway to it was largely controlled by the common law – the common law courts defined the parameters for deciding whether or not a worker was an employee. While the terms and conditions under which employees worked may have been determined through some collective processes, the day-to-day control of their employment remained in the hands of management relying on the implied obligation of employees to obey lawful instructions and on the obligation of fidelity. And, of course, employment discipline was enforced by the right of arbitrary dismissal – the silence of the common law was not because of a lack of power but because its disciplinary exercise was arbitrary and rarely able to be challenged.

The objective of this book is to analyse this interplay of forces shaping the common law of employment and, in particular, the influence of, and interplay with, statutory law in key areas of employment. Our primary objective is to assess the extent to which the core values embodied in the contract of employment continue to shape the development of the contemporary employment relationship as that relationship has evolved over time in response to changes in the economic and industrial relations environments in each of the three countries. While it will cover a range of key issues including the constraints on the key implied terms, especially arbitrary dismissal, it will focus on some contemporary drivers and contradictions in employment relationships. For example, the common law courts have had, at least up until recently, considerable difficulty seeing beyond the commodity-based perspective that an employee is employed solely for the commercial purposes of the employer and should have no expectations beyond the agreed wage or salary. In *William Hill v Tucker*, in the context of the employee

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12 Deakin and Wilkinson (n 5) 108.

seeking to be accorded the right to be given actual work to do, it had been argued by counsel for the employee that:14

it is a guiding principle (not a universal rule) when construing a contract of employment that the employee’s interest in doing his job, as well as being paid his salary, is now recognised; in particular in the case of skilled workers and others who benefit from practising their skills either because their remuneration depends on it or because their career prospects would be thereby advanced.

In finding for the employee, the Court of Appeal accepted that: ‘as social conditions have changed the courts have increasingly recognised the importance to the employee of the work, not just the pay’.15

In a similar vein in *Blackadder*:16

It may be that in modern times, a desire for what has been called ‘job satisfaction’, and a need for employees of various kinds, to keep and to be seen to have kept their hands in by actual work have a role to play in determining whether work in fact should be provided.

Whilst this recognition is to be welcomed, the key question is whether there has been any consequential impact on contractual doctrine. We will return to that question in subsequent chapters. It should also be said that the traditional perspective is, however, in conflict with the notion that an employee expects benefits such as skill development, career progression, and enhanced employability – the so-called ‘psychological contract’.17

This is especially the case when employees have funded high and expensive levels of education. Such education constitutes a considerable ‘property’ investment in employment that may be jeopardized by employer actions such as an unjustified dismissal or because of demand for flexible employment in professional and technical jobs that traditionally were ‘for life’. Long-term employment, resulting in skills becoming more firm specific, potentially becomes a liability for the employee.

Additionally, labour markets do not remain static and labour law responds to changes, especially dramatic changes, in the labour market. One can see a contemporary contradiction with two pressures driving

14 ibid [12].
15 ibid [18].
16 *Blackadder v Ramsey Butchering Services Pty Ltd* [2005] HCA 22, [80].
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legal developments. The first is increasing flexible and precarious employment as employers seek to maximize their flexibility and shift risk onto employees. A second, and opposed tendency, is to treat the employment relationship as one that increasingly demands an expanding loyalty from the worker. This is illustrated by the courts allowing employers to intrude into an employee’s private life, and in some jurisdictions to expand both the duty of fidelity and the scope of post-employment restraints. As is discussed in Chapter 2, the twentieth century saw the great majority of persons contracting to provide personal performance of work being combined into the single category of employees employed under a contract of employment. Contemporary developments present a major challenge to that categorization.

Hitherto contracts of employment, as with most commercial contracts, were, at heart, concerned with risk allocation. In the last 20 to 30 years, courts in a number of jurisdictions have accepted that an imbalance of power is a hallmark of employment relations. In New Zealand, for example, Sir Ivor Richardson has said: ‘History tells us that in the absence of any organisation there is too great a risk of inequality of bargaining power, of exploitation of workers, and of damage to the social fabric’. Against that backdrop, a question central to employment law is the extent to which the courts are prepared to intervene to prevent undue commercial/employment risk being transferred by the stronger party – the employer – to the employee. A number of related questions also arise such as whether the courts will, through devices such as implied terms, impose standards of behaviour in the workplace that align to contemporary thinking on how the parties to the employment relationship ought to behave.

Ideally, the law as a whole, whether the common law or statute, should reflect changing employment circumstances in answering such questions. The fact that the courts increasingly view the employment contract as ‘relational’ might be thought to be a positive step so far as employees are concerned. A relational contract might be defined as a ‘contract that involves not merely an exchange, but also a relationship between the contracting parties’. The employment contract is a paradigm instance of a contract of that nature and categorization as relational, in the eyes of some courts, facilitates implication of a term of good faith given the

values that such contracts are said to espouse. An important question that then arises is whether categorization as relational will have any such impact on the law of the employment contract. It is, however, conceivable that the term ‘relational contract’ may come to be seen ‘as no more than a “convenient phrase” in the manner of the tortious concept of assumption of responsibility in that the generality of language used can encompass the key features of the employment relationship but, at the same time, fails to offer the degree of specificity required to guide future developments’. In the United Kingdom and New Zealand, the most significant development in the law of the employment contract that might have been expected to take place through categorization as relational actually predates judicial interest in relational contracts; that is, the implication of the mutual trust and confidence term.

Recent changes in the law of the employment contract have been compelled by a number of factors such as recognition of the significance of inequality of bargaining power and the importance of the non-economic dimensions of the employment relationship. It is also the case that contract law in a number of jurisdictions is moving towards a position whereby good faith stands centre stage: this may represent the ‘new commercial morality’. In Canada, the Supreme Court in Bhasin v Hrynew recognized that good faith constituted an overarching principle in the general law of contract, and this allows more specific developments within the employment contract to be mainstreamed. A law of contract where good faith played a central role would undoubtedly prompt further evolution in the law of the employment contract, although, as is demonstrated by the history of the statutory duty of good faith in New Zealand, the definition of such concepts can be crucial to their subsequent influence.

This book considers how the common law in three similar, yet different, jurisdictions has responded to these central questions and issues in employment law and how these jurisdictions will respond in the face of rapidly evolving working practices that are reshaping employment relationships.

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20 The United Kingdom Supreme Court took the view that an employment contract is relational in nature in Braganza v BP [2015] ICR 449.
21 See Douglas Brodie, ‘Relational Contracts’ in Mark Freedland and others (eds), The Contract of Employment (Oxford University Press 2016).
22 An employment contract may incorporate the mutual obligation of trust and confidence expressly.
23 See Brodie (n 21).