

**Centre for Employment and Labour Relations Law
The University of Melbourne**

October 2005

Working Paper No. 36

**RE-INVENTING UNEMPLOYMENT:
WELFARE REFORM AS LABOUR
MARKET REGULATION**

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ISSN 1321-9235

Re-Inventing Unemployment: Welfare Reform as Labour Market Regulation

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One of the many peculiarities of labour as a commodity is that, unlike many commodities, it is not in fact produced for sale. The supply-side of the labour market operates relatively autonomously from the specific requirements and demands of the labour market, and the reproduction of labour proceeds unrelated to calculations about its subsequent saleability on the market.¹ A key regulatory 'problem', then, in constituting a market for labour, is securing a supply of labour-as-commodity in the first instance.²

Since the mid-twentieth century it has become commonplace to think of labour supply in terms of the 'Labour Force Framework', whereby the population is divided into three mutually exclusive categories: the employed, the unemployed, and those outside the labour force. The unemployed were counted as 'in the labour force' as opposed to those 'unavailable' for work and hence 'outside the labour force'.³ Unemployment according to this understanding was a condition clearly distinct from employment on the one hand and from other forms of worklessness, such as disability, sickness, retirement and strike action on the other.

This apparent distinction between the 'employed' and the 'unemployed' meant labour law as an academic field in Australia in the second half of the twentieth century could largely ignore the regulation of the unemployed. This was reinforced by the institutional design of Australia's income support system. Because social security was established as a flat-rate, needs-related payment, paid out of consolidated revenue, eligibility was not related to prior labour force participation nor was entitlement related to prior wages. In effect, social security appeared neither to be related to the contract of employment nor seen as a collective 'industrial' issue as it did, for example, in continental European accounts and as, eventually, superannuation would in Australia. At the same time, this distinction reflected the lived experience of many Australians. The institutional forms of the Australian welfare state established a fairly stark work-welfare divide. Wage-earners had certain 'welfare' ends (minimum income, payment for sickness) secured through the industrial tribunals' determination

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1 Claus Offe, *Disorganised Capitalism*, Polity, Cambridge, 1985; Jane Humphries and Jill Rubery, 'The Reconstitution of the Supply Side of the Labour Market: The Relative Autonomy of Social Reproduction' (1984) 8 *Cambridge Journal of Economics* 331.

2 Claus Offe and Gero Lenhardt, 'Social Policy and the Theory of the State' in Claus Offe, *Contradictions of the Welfare State*, Hutchinson, London, 1984.

3 See Stanley Moses, 'Labour Supply Concepts: The Political Economy of Conceptual Change' (1975) 418 *Annals of the American Academy of Political and Social Sciences* 26.

of the living wage, and social security provisions were established as a residual measure for those standing outside work for socially legitimate reasons.⁴ This gave rise to a mid-century model of taxonomy and division (the wage earner, the unemployed, etc), with each category requiring its own distinct form of intervention (wages, welfare) and discrete regulatory domains (industrial tribunals, social security offices).

Similarly, social policy administrators were concerned with delineating the boundary between the unemployed and those 'not in the labour force'. Here, the Labour Force Framework was underpinned by legal requirements that the genuinely unemployed present themselves for work as a condition of receiving unemployment income support. Thus the unemployed were mobilized as labour market participants through the imposition of a duty to work or to seek work.⁵

This understanding of the particular position of the unemployed as somehow *out of work* but *in the labour force* and hence able to be mobilised as a fairly immediate labour supply perhaps strikes us today as an obvious point. Yet I argue that such an understanding is contingent and historically conditioned, linked to the changing political economy of the employment relationship and dependent on specific regulatory techniques deployed by the state. The 'labour force framework' was in fact not consolidated at the level of national economic statistics in Australia until 1947,⁶ and the establishment of an income support payment based on 'unemployment' had occurred only three years earlier.⁷

One way of reading the relatively late emergence of unemployment as a robust administrative and statistical category is that, up until the 1940s, the structure of the labour market and people's lived experience of paid work precluded the easy delineation of the population into the categories of 'employed', 'unemployed' and 'not in the labour force'. Examination of the emergence and evolution of the legal and administrative forms of unemployment can tell us, then, a lot about the evolution of the labour market itself in Australia. In this paper I want to focus on the legal and administrative forms of unemployment benefit as a particularly innovative and potent source of regulation, which takes as its core the 'work test' and mediates its application through specific administrative apparatuses, often centred on the labour exchange. It is these legal designations of a 'duty to work'⁸, and the institutional arrangements that administer them (such as the former Commonwealth Employment Service and the current Job Network) that underpin the Labour Force Framework and

4 Francis Castles, *The Working Class and Welfare*, Allen and Unwin, Sydney, 1985.

5 Examining the administration of the work test at the beginning of the 1980s, Alan Jordan concluded that the function or objective of the work test was to distinguish the person 'who is a current although unemployed member of the labour force from the person who, although jobless, is not': Alan Jordan, *Work Test Failure: A Sample Survey of Terminations of Unemployment Benefit*, Research Paper No 13, Department of Social Security, Canberra, 1981, pp 6-7.

6 Commonwealth of Australia, Bureau of Census and Statistics, *Census of the Commonwealth of Australia 1947: Statistician's Report*, Commonwealth Government Printer, Melbourne, 1947.

7 *Unemployment and Sickness Benefits Act 1944* (Cth.).

8 For a full historical account of the duty to work in the British context, see Simon Deakin and Frank Wilkinson, *The Law of the Labour Market: Industrialisation, Employment and Legal Evolution*, Oxford University Press, Oxford, 2005, ch 3.

so define who are, and under what conditions, expected to offer themselves for sale on the labour market.

My approach entails, firstly, not taking unemployment as a simple economic variable that waxes and wanes according to prevailing economic conditions, but as institutionally constructed and derived from standardised conventions about how to count it, administrative rules about social security eligibility and benefits, and labour management practices.⁹ Similarly, unemployment policy and benefits administration cannot be understood as simply a reaction to a labour market ‘problem’, but should be seen as contributing to the constitution of the market itself.¹⁰ Secondly, in suggesting that unemployment as a robust administrative and legal category arose in tandem with the consolidation of particular employment norms, I am also suggesting that, as such employment norms decline, we can expect to see the traditional notion of unemployment begin to lose purchase, and hence a flurry of policy and regulatory reform that ‘re-invents’ unemployment as an administrative category more suited to a changing labour market.

Thus three related themes run through my examination of these notions in the Australian context. The first is the articulation between unemployment policy and non-standard labour, an articulation which has changed markedly over the course of the twentieth century. Secondly, both the range and type of regulatory interventions and tools that are utilised under the rubric of unemployment policy have also changed and diversified. Thirdly, the progressive ‘re-inventions’ of unemployment that this has entailed may ultimately lead to unemployment losing its salience as a useful regulatory category altogether.

The paper proceeds as follows. I will begin with some general observations on the problem of defining unemployment or the unemployed person in the first half of the twentieth century, and provide a brief overview of state measures to support the unemployed as instituted in the late 1940s and the role these played in the constitution

9 For examples of other accounts that examine unemployment as a social invention, see John Garraty, *Unemployment in History: Economic Thought and Public Policy*, Harper Colophon Books, New York, 1979; on Britain, see Krishan Kumar, ‘From Work to Employment and Unemployment: The English Experience’ in Ray Pahl (ed), *On Work: Historical, Comparative and Theoretical Approaches*, Blackwell, Oxford, 1988; Noel Whiteside, *Bad Times: Unemployment in British Social and Political History*, Faber, London, 1991; William Walters, *Unemployment and Government: Genealogies of the Social*, Cambridge University Press, Cambridge, 2000; on France, see Robert Salais, Nicolas Baverez and Benedicte Reynaud, *L’Invention du Chômeur: Histoire et Transformations d’une Catégorie en France des années 1890 aux années 1980*, Presses Universitaires de France, Paris, 1986; Christian Topalov, *Naissance du Chômeur: 1880-1910*, Albin Michel, Paris, 1994; on the former Soviet bloc, see Phineas Baxandall, *Constructing Unemployment: The Politics of Joblessness in East and West*, Ashgate, Aldershot, 2004; on Australia, see Anthony O’Donnell, ‘Inventing Unemployment: Labour Market Regulation and the Establishment of the Commonwealth Employment Service’ (2003) 31 *Federal Law Review* 342. Generally, economic historians in Australia have been more concerned with examining the extent to which pre-Second World War statistical sources give an ‘accurate’ measure of unemployment, rather than exploring how the category of unemployment is constructed over time. For informative exceptions, see Tony Endres, ‘Designing Unemployment Statistics in New Zealand: A History Study in Political Arithmetic c1860-1960’ (1982) 22 *Australian Economic History Review* 151 and Tony Endres and Malcolm Cook, ‘Concepts in Australian Unemployment Statistics to 1940’ (1983) *Australian Economic Papers* 68.

10 cf. Offe and Lenhardt, above n 2, 98.

of the mid-century labour market.¹¹ I will then discuss the changing legal norms and administrative practices around unemployment since the 1970s, before going on to discuss how these reforms might reconstitute the unemployed as a labour supply for emerging labour markets. Finally, I will offer some reflections on the nature of the new regulatory forms that have emerged from this process of welfare reform.

The Pre-War Labour Market in Australia and the Problem of Unemployment

Over the course of the late eighteenth and early nineteenth century in many Western economies, workers were increasingly incorporated into a monetised, market economy. New large cities both concentrated workers and offered only minimal alternatives to waged labour. Lack of paid work became a greater threat the more wages became the 'sole precarious base' of living, rather than one component among many.¹² Across the middle years of the nineteenth century, the phenomenon of unemployment became a mobilising force in certain quarters of working class politics and by the 1880s was manifesting itself in street-level disturbances and rioting in London.¹³ Yet prevailing labour management strategies of the early industrial era, based around sub-contracting arrangements and large pools of casual labour, meant insufficiency of work tended to manifest itself as widespread *underemployment* rather than as the phenomenon we would today recognise as unemployment (ie. fairly absolute and possibly prolonged economic inactivity).

Across the nineteenth century, the Australian labour market was dominated by small, technologically unsophisticated workplaces, operating on batch production, with seasonal instability in many industries. The economy remained oriented predominantly towards primary production, with the rural sector providing 60 per cent of the national product even as late as the 1930s, which meant seasonal fluctuations as regards both the distribution and processing of a wide range of products. Manufacturers tended to deal with a fluctuating volume of short-term orders which meant they could provide few stable jobs. Whereas some clerical and supervisory staff may have enjoyed ongoing employment, workers on the shop floor tended to bear the brunt of fluctuations, with women and juveniles in particular providing a large pool of short-term, casual labour.¹⁴ Large mass production firms remained the exception as the small domestic market limited economies of scale, resulting in a large number of small-scale producers. By the 1920s family-owned and managed firms still dominated the economy, and the average number of wage earners per establishment in Australia in 1929 was only 15.6.¹⁵ In any case, early factory production often merely brought under one roof artisans who continued to labour in a

11 This material is covered in more detail in O'Donnell, above n 9.

12 Kumar, above n 9, 151.

13 See, eg, Richard Flanagan, *'Parish Fed Bastards': A History of the Politics of the Unemployed in Britain, 1884-1939*, Greenwood Press, New York, 1991.

14 Jenny Lee and Charles Fahey, 'A Boom for Whom? Some Developments in the Australian Labour Market, 1870-1891' (1986) 50 *Labour History* 1; S H Fisher, 'An Accumulation of Misery' (1981) 40 *Labour History* 16

15 Christopher Wright, *The Management of Labour: A History of Australian Employers*, Oxford University Press, Melbourne, 1995, p 16. Comparable figures for Canada were 25.3; for the United States, 41.9.

self-contained way as contractors.¹⁶ Contracts for the supply of labour were often organised in such a way as to transfer the risk of shortage of work onto the worker through piece work arrangements,¹⁷ or by characterising the work relationship as a leasing arrangement,¹⁸ partnership¹⁹ or a contract for purchase and sale.²⁰

Along with sub-contracting, seasonal and casual hiring also shifted the risk of unstable product markets to workers, resulting in short-term work with frequent interruptions to earnings. In 1927 the Royal Commission on national insurance identified rural employment, the meat and flour industries and building work in the construction industry as characterised by seasonal fluctuations; many collieries in the coal industry averaging less than four days work per week; the boot trade and textile industries relying extensively on short-time work and rostering; and continuous work in the steel industry supplemented by the casual employment of men gathered at the smelter gates.²¹ The Commonwealth Arbitration Court also identified the existence of intermittent employment — in the sense of fairly regular short-term variations — in certain industries and attempted to ameliorate its effects through loading a higher hourly rate in the relevant awards. By the second half of the 1920s, this higher rate was written into awards covering wharf workers, builders' labourers, shearers, flour mill workers and those working in the meat export and sugar industries.²²

Various forms of underemployment persisted into the 1930s, with work rationing and short-time work a widespread response to the Depression.²³ In South Australia and Victoria the practice affected both public and private sectors,²⁴ and in New South Wales was utilised in the railways²⁵ and amongst miners.²⁶ As early as the 1920s the vagaries of the clothing and furniture trades led the Arbitration Court to insert into

- 16 Ibid 18-19; G J R Linge, *Industrial Awakening: A Geography of Australian Manufacturing 1788-1890*, Australian National University Press, Canberra, 1979, p 482, gives examples of brick makers in brick factories paid on a piecework basis, with each paying a helper to carry clay and sand and for whom the brick company itself took no responsibility; and 'twisters' in some tobacco factories hiring and paying assistants who were not included on the firm's books. In the clothing trades, men would sometimes work on a firm's premises, but often also work was taken home, suggesting the distinction between the 'inside worker' and the outworker was not clearly fixed: pp 203, 298.
- 17 *Amalgamated Miners' Association, Wrightville v Great Cobar Ltd* [1907] AR(NSW) 53 at 57-58.
- 18 *Re Kahn* [1904] AR(NSW) 387.
- 19 *Henwood v Holmes* [1910] AR(NSW) 451.
- 20 Victor Clarke, *The Labour Movement in Australasia: A Study in Social Democracy*, Burt Franklin, New York (first published 1906, 1970 ed) 197-198.
- 21 Commonwealth of Australia, Royal Commission on National Insurance, *Second Progress Report: Unemployment*, Parl Paper No 79 (1926-28), pp 7-8.
- 22 George Anderson, *Fixation of Wages in Australia*, Macmillan, Melbourne, 1929, p 490.
- 23 E Ronald Walker, *Unemployment Policy: With Special Reference to Australia*, Angus and Robertson, Sydney, 1936, p 85; Colin Forster, *Unemployment and the Australian Economic Recovery of the 1930s*, Working Paper No 45, Department of Economic History, Australian National University, Canberra, 1985, p 11.
- 24 Ray Broomhill, 'Underemployment in Adelaide During the Depression' (1974) 27 *Labour History* 31; LJ Louis, *Trade Unions and the Depression: A Study of Victoria, 1930-1932*, ANU Press, Canberra, 1968.
- 25 See Jonathan Pincus, *Aspects of Australian Public Finances and Public Enterprises, 1920 to 1939*, Working Paper No 53, Department of Economic History, Australian National University, Canberra, 1985.
- 26 Commonwealth Bureau of Census and Statistics, *Official Year Book of New South Wales 1934-35*, Commonwealth Government Printer, Melbourne, 1937, p 752.

awards two days notice of termination provisions and ‘turns’ for employees in slack times which spread available work over the entire workforce.²⁷ More awards were modified to allow short-time work, ‘turns’ and rationing to accommodate the extreme economic troughs of the Depression.²⁸ Even in those trades covered by strong craft unions, work rationing was accepted as a response to Depression,²⁹ and the extensive use of casual employment continued through the 1930s, even in larger enterprises.³⁰ Underemployment came to be seen to some degree as normal and hence unremarkable.³¹

This preponderance of intermittent or fluctuating work impeded an easy differentiation of the unemployed from the employed. Official statistics enumerating the ‘unemployed’ have been published in Australia since 1891, but the nature of the statistical definition has changed, reflecting different understandings of ‘normal’ employment and labour markets and thus how irregular forms of employment have been rendered problematic. In colonial and Commonwealth censuses, the pre-eminent category was that of ‘gainful worker’, which had no temporal or strictly behavioural dimension: people recorded their *usual* occupation and may not have been working at their occupation on the day or week that the census count was taken. As a subset of this category, ‘unemployment’ remained an imprecise term and operated at various times as a descriptor of a wide array of labour market statuses and often included lack of work due to illness, accident, strike, lockout or old age.³²

- 27 See, eg, *Federated Clothing and Allied Trades Union v Andrews* (1923) 18 CAR 1032; see also Anderson, above n 22, 492-495.
- 28 *Health Inspectors Association v City of Greater Brisbane* (1931) 30 CAR 322; (1932) 31 CAR 141. See Christopher Arup, ‘Job Security or Income Support?’ (1976) 7 *Federal Law Review* 146.
- 29 J Hagan, *Printers and Politics: A History of the Australian Printing Unions 1850-1950*, ANU Press, Canberra, 1966, p 242; Tom Sheridan, *Mindful Militants: The Amalgamated Engineering Union in Australia 1920-1972*, Cambridge University Press, Cambridge, 1975; John Merritt, ‘The Federated Ironworkers’ Association in the Depression’ (1971) 21 *Labour History* 48.
- 30 See, eg, Peter Cochrane, ‘Anatomy of a Steel Works: The Australian Iron and Steel Company Port Kembla, 1935-1939’ (1989) 57 *Labour History* 61.
- 31 Several contemporary commentators identified casual labour — brought about by the seasonality of work and the proliferation of small enterprises — as a persistent and ‘normal’ feature of the interwar labour market that would continue after the crisis of the Depression had passed: E Ronald Walker, ‘The Unemployment Problem in Australia’ (1932) 40 *Journal of Political Economy* 210 and AG Colley, ‘New South Wales Unemployment Statistics’ (1939) 11 *Australian Quarterly* 96. Income data from the 1933 Commonwealth census indicate a significant number of ‘working’ households with an annual income less than that provided by the basic wage, suggesting the continued presence of intermittent or short-time working: Ian McLean and Sue Richardson, ‘More or Less Equal? Australian Income Distribution Since 1933’ (1986) 62 *Economic Record* 67.
- 32 For a comprehensive discussion see Tony Endres and Malcolm Cook, ‘Concepts in Australian Unemployment Statistics to 1940’ (1983) *Australian Economic Papers* 68. The 1901 Census used a time reference which also served to give some indication as to possible ‘causes’ of worklessness, recording as unemployed only those persons not at work for more than a week immediately prior to the Census. This was presumed to exclude those temporarily out of work due to lay-off, industrial dispute or short-term illness. In 1911, those returning as unemployed were asked to state the period. Again, those out of work for less than a week were excluded from the count, as were those for more than a year, on the assumption that the latter were aged and had permanently retired from the work force. The 1921 census more explicitly inquired after the causes of unemployment, but the catch-all category ‘scarcity of work’ offered little by way of explanation, not distinguishing ‘scarcity’ of work in a particular trade or at a preferred rate from sheer lack of work at any rate.

Trade union returns as to numbers of members out of work offered an alternative source of statistics on unemployment.³³ Yet union understandings of unemployment were intimately tied up with the protection of work practices and negotiated rates of pay. Unionists quit if an employer was in breach of workplace agreements and expected support from their union in such circumstances, while members looking for work were expected to refuse work with such employers and be supported as well. Similarly, an ‘unemployed’ union member on the books was not necessarily totally out of work, perhaps taking the odd casual job but on the understanding that it was not work ‘in the trade’, the search for which would still be supported.³⁴ Several Australian craft unions established ‘out-of-work’ funds in the late nineteenth century, where loss of work due to industrial disputation was fully supported, as was the case in the Australasian Society of Engineers³⁵ and in the plumbing, boot making, carpentry³⁶ and printing trades.³⁷ The possibility of support for ‘out of work’ members thereby exerted a union discipline over members who might otherwise have been prepared to work for less than union rates. The interpretation of trade union returns of unemployment is again complicated in those sectors where short-time work was a common method of managing fluctuating demand.³⁸ Overall, the ‘unemployed’ as measured by trade union returns were hardly a uniform group, but varied according to industrial sector and work practices within that sector.³⁹

Inventing Unemployment: Labour Exchanges, Arbitration and Managerial Practice

As we can see, the political and institutional discourse around ‘unemployment’ in this period prior to the Second World War was a work-in-progress. It was in this context that social reformers began to call for the ‘organisation’ of the labour market as a necessary prerequisite for addressing the problem of unemployment. Yet while such

- 33 Trade union unemployment statistics were first officially collected and published by the Commonwealth Bureau of Census and Statistics in 1913. Union officials furnished quarterly returns, stating the number of members unemployed on a specific date for more than three days during the last week of the middle month of each quarter. Those out of work due to lack of work, sickness, accident or ‘other’ causes were included, but those out of work due to strike or lockout were excluded. The returns covered about half the members of Australian trade unions, excluding highly seasonal or casualised industries, such as wharf labourers and pastoral and agricultural workers, and those characterised by very stable or ‘permanent’ employment, such as the railways. The groups for which they provided a meaningful sample tended to be manufacturing, building and mining. All in all, the returns covered twenty to twenty-five percent of the workforce, substantially biased towards male workers. See Commonwealth Bureau of Census and Statistics, *Labour Report 1925*, Commonwealth Government Printer, Melbourne, 1926, p 111 and Colin Forster, ‘Australian Unemployment, 1900-1940’ (1965) 41 *Economic Record* 426.
- 34 Whiteside, above n 9, 52-53.
- 35 Sheridan, above n 29, 13; N G Butlin, ‘An Index of Engineering Unemployment, 1852-1943’ (1946) 22 *Economic Record* 241.
- 36 P N Ebbels (ed), *The Australian Labour Movement, 1850-1907: Extracts From Contemporary Documents*, Australasian Book Society, Sydney, 1976, pp 76-82.
- 37 Hagan, above n 29, 66-7; RT Fitzgerald, *The Printers of Melbourne: The History of a Union*, Pitman, Melbourne, 1967.
- 38 This may lie behind the inclusion of ‘part-time’ and casual workers in New South Wales returns.
- 39 The connection between trade union ‘unemployment’ and the protection of work practices was possibly one of the factors leading to official scepticism as to the worth of trade union unemployment returns. Despite the fact that the Commonwealth government had initially encouraged the collection of returns, by the late 1920s their reputation had fallen: Forster, above n 33.

reformers — most prominently the Webbs and William Beveridge — began to define unemployment as a social and administrative problem related to labour market organisation and separate from the cultural or moral interpretations associated with poverty or pauperism,⁴⁰ these latter interpretations continued to inform the development of social policy in this area. The emerging view was that there was presumed to be a group of deserving unemployed: regular labourers clearly capable and willing to undertake regular work who were unable to find it, but extensive casualisation and generalised underemployment made it difficult to distinguish this group from those merely disinclined to regular work due to a range of mental, moral and physical reasons.⁴¹ They saw the appropriate response as the decasualisation of the labour market and the transfer of necessary workmen to regular, permanent employment. This would allow any superfluous population to be identified and then more easily policed according to the categories of deserving and undeserving poor. In particular, it was thought that a national network of labour exchanges could rationalise hiring procedures, whereby reliance on intermittent casual work would be made impossible, and the offer of full-time work through the exchange would compel ‘the lazy or incapable’ to be come ‘regular’.⁴²

By decasualising and concentrating work on a restricted group of workers, the labour exchange program in effect constructed unemployment as absolute — and possibly prolonged — inactivity.⁴³ The paradox here, as Beveridge recognised, was that decasualisation would in fact contribute to worklessness: ‘in making work more regular for some...it throws others out altogether... The avowed object of decasualisation is to replace every thousand half-employed men with five hundred fully employed men’.⁴⁴

In short, labour exchanges were not seen as responding to the empirical reality of unemployment, but as constituting the very subject they sought to act upon. Classical economics presumed a fluid and frictionless labour market, tending toward equilibrium of supply and demand, making ‘involuntary’ unemployment both a fairly transient and easily identifiable phenomenon. The problem for rational-minded reformers was that worklessness was not manifesting itself in this way. The solution was to use the labour exchange to concentrate in time and space the forces of supply and demand,⁴⁵ and thus provide a way ‘of making reality correspond with the assumptions of economic theory’.⁴⁶

40 William Walters argues that ‘the casual labour problem marks the point at which the problems of poverty and pauperism begin to be linked to forms of employment’, creating a space of inquiry where the links between labour markets, forms of employment and forms of social and moral life became established: Walters, above n 9, 26.

41 See Malcolm Mansfield, ‘Labour Exchanges and the Labour Reserve in Turn of the Century Social Reform’ (1992) 21 *Journal of Social Policy* 435.

42 William Beveridge, evidence to the Royal Commission on the Poor Laws 1907, cited in Whiteside, above n 9, 62.

43 Mansfield, above n 41, 456.

44 W H Beveridge, *Unemployment: A Problem of Industry*, Longmans, Green and Co, London, 1931, p 204.

45 Walters above n 9, 281.

46 Beveridge, above n 44, 237. The extent to which the reality of British industrial relations in the first decades of the twentieth century persistently failed to correspond to the economic theory embodied in the national labour exchange system is explored in Malcolm Mansfield, ‘Flying to the Moon:

This conflating of the problems of casual, irregular employment and unemployment, and the regulatory imperative to ‘organise’ the labour market around full-time, ongoing contracts of employment was echoed in Australia.⁴⁷ Reflecting British debates, by the 1920s unemployment was seen largely as a problem related to casual labour,⁴⁸ with the solution being a national network of labour exchanges providing a centralised clearing house, connecting areas experiencing labour shortage with those experiencing labour surplus.⁴⁹

Whether State government labour exchanges actually operated to organise the labour market in this way prior to the Second World War is doubtful. Early twentieth century labour exchanges, in responding to social distress, tended to distribute available jobs in rotation over a large number of the registered unemployed in order to provide ‘relief work’. In effect, rather than stamping out casual labour in the manner advocated by Booth and Beveridge, the bureaux became the headquarters of a mobile casual labour reserve.⁵⁰

Ultimately, the *regulatory* impetus toward ‘permanent’ or indefinite employment would come not from the diffusion of the labour exchange, but through Australia’s arbitration system and the direct collective regulation of conditions of employment. This process consisted, first, of bringing different forms of labour hire within a uniform legal conception of the contract of employment, a process that proceeded slowly from the end of the nineteenth century through the early decades of the twentieth.⁵¹ By interpreting its mandate as one to regulate relations between capital and labour more widely, the Arbitration Court also managed to regulate by indirect means the wages and conditions of some of those work relationships that stood

Reconsidering the British Labour Exchange System in the Early Twentieth Century’ (2001) 66 *Labour History Review* 24.

47 The idea that labour exchanges could better organise the labour market can be found in Australian public discourse from the 1890s: see, eg, Victoria, *Report of the Board of Inquiry on Unemployment*, Papers presented to Parliament, vol. 2, (1900), p 335 and C D W Goodwin, *Economic Enquiry in Australia* 1966, p 226; Both the National Development and Migration Commission and the Royal Commission on National Insurance linked the ‘diversity of methods and agencies by which jobs are filled’ with the ‘creation of numbers of separate reserves of labour within the respective industrial groups’ and hence unemployment.

48 Commonwealth of Australia, Royal Commission on National Insurance, *Second Progress Report: Unemployment*, Parl Paper No 79 (1926-28).

49 *Ibid*, 13.

50 See Tony Endres and Malcolm Cook, ‘Administering “The Unemployed Difficulty”’: The NSW Government Labour Bureau 1892-1912’ (1986) 26 *Australian Economic History Review* 56; Anthony O’Donnell and Richard Mitchell. ‘The Regulation of Public and Private Employment Agencies in Australia: A Historical Perspective’ (2001) 23 *Comparative Labor Law and Policy Journal* 7 at 15–19. Similarly, although Beveridge proved instrumental in having the Liberal government in Britain enact the Labour Exchange Act in 1909, it is doubtful whether the British exchanges really stopped the type of ‘hawking’ of labour that concerned Beveridge. Beveridge’s 1909 book on unemployment was republished, with additional chapters, in 1930 with the claim that unemployment was still related to ‘the flux of employment’, the latter persisting because his original policy prescriptions had not been fully carried through: Beveridge, above n 44, 401-3. However, in neither the original nor republished versions did Beveridge produce any broad-based empirical evidence as to actual patterns of job search and recruitment to support his claims.

51 John Howe and Richard Mitchell, ‘The Evolution of the Contract of Employment in Australia: A Discussion’ (1999) 12 *Australian Journal of Labour Law* 113.

outside the employment contract.⁵² By integrating increasing numbers of workers into established wage-fixing procedures, the attractiveness to employers of various subcontracting arrangements and forms of labour hire outside of the employment relationship was weakened. In Australia, such a development had a particular impact, as it gradually allowed increasing numbers of wage-dependent workers to be subject to the jurisdiction and award determinations of the Arbitration Court. From the 1920s, the Arbitration Court adopted a policy of stabilising and standardising many of the conditions of the employment relationship, favouring full-time, weekly hiring over casual hire, with accrued entitlements to recreation and sick leave and limitations on the employer's right to temporarily stand down workers.⁵³ By the late 1920s weekly hiring applied to core workforces comprising blacksmiths, engineers, carpenters and joiners in shops, coopers, wool workers, manufacturing grocers' employees, timber workers, furniture trades employees, liquor and allied trades employees, storemen and packers and workers in the printing industry, clothing industry, meat industry and food preserving industry.⁵⁴

But, as we have seen, in many instances the conciliation and arbitration system continued to legitimise non-standard work in its awards well into the 1930s.⁵⁵ Ultimately, however, socio-economic conditions assured that certain types of management practice became generalised so that forms of intermediate labour subcontracting, casual labour and so on, were displaced in favour of bureaucratically controlled, long-term employment relations. The Second World War boosted the size and scale of manufacturing in Australia and helped employers to realise the benefits of planned production, product standardisation and specialisation. Postwar consumer demand fuelled a boom in car, home and appliance ownership. The new mass market for generic, standardised products resulted in changes in the labour process, with long production runs, limited to repetitive and standardised tasks within established rhythms. Stable employment underpinned by the open-ended employment contract now offered employers distinct advantages over earlier forms of labour hire as it enabled employers to contract for future availability of labour, often with firm-specific skills.⁵⁶ This was reinforced in postwar Australia by the emergence of an

52. Esther Stern, *'Industrial Disputes' and the Jurisdiction of the Federal Industrial Tribunal*, LLM Thesis, University of Melbourne (1993) 115-116; *Federated Clothing Trades of the Commonwealth of Australia v Archer* (1919) 27 CLR 207; *Amalgamated Clothing and Allied Trades Union of Australia v Chas F Hawkins Pty Ltd* (1930) 29 CAR 182; *Amalgamated Engineering Union v Metal Trades Employers Association* (1931) 30 CAR 734. The regulation of subcontracting in clothing and textiles was specifically addressed with an award in 1937: Raelene Frances, *The Politics of Work: Gender and Labour in Victoria, 1880-1939*, Cambridge University Press, Melbourne, 1993, p 143.

53 Weekly wages under an employment contract were seen by the Commonwealth Conciliation and Arbitration Court as not only better in terms of guaranteeing workers subsistence, but as beneficial to industry and to society as a whole: see *Federated Gas Employees Industrial Union v Geelong Gas Company* (1919) 13 CAR 437 at 463; *Waterside Workers Federation v Commonwealth Steamship Owners Association* (1914) 8 CAR 52 at 72; *Commonwealth Steamship Owners Association v Waterside Workers Federation* (1928) 26 CAR 867 at 875-6.

54 Anderson, above n 22, 491.

55 See above at footnotes 22 and 27-8.

56 Certain large, highly-capitalised Australian enterprises of the pre-War period, often enjoying monopolies, were also able to offer stable employment, such as the New South Wales Railways and various banking and insurance firms: see Greg Patmore, 'Systematic Management and Bureaucracy: The New South Wales Railways Prior to 1932' (1988) 1 *Labour and Industry* 306; David Merrett and Andrew Selzer, 'Personnel Practices at the Union Bank of Australia: Panel Evidence from the 1887-

extremely tight labour market.⁵⁷ The offer of long-term stable employment, greater job security, rewards for seniority, common enterprise policies with company-wide job descriptions and procedures, and centralised personnel departments that regularised both external hiring and internal promotion were all seen as ways to attract and retain all grades of labour and to reduce industrial unrest resulting from trade unions' increased bargaining power.⁵⁸

Such 'impersonal' rules also tended to suit a labour process — both manual and clerical — increasingly routinised around rationalised 'work stations', substitutable as between one worker and another. This also meant adjustment to fluctuations tended to take place around the number of 'work stations' occupied, and downturn came to be managed primarily through redundancy. This was reinforced by the regulatory environment outlined earlier: whereas weekly hiring and the limits on stand down came to signify a kind of 'permanent' or open-ended employment, it also meant that termination of an employee with a week's notice was, in principle, the mandated way of dealing with slack periods rather than placing him or her on short-time or reliance on casual labour.

The Work Test in the Postwar Labour Market

The preceding section indicated that the emergence of unemployment depended in part on a particular organisation of the labour market, whereby the 'unemployed' stood clearly delineated from the 'employed'. Many social reformers emphasised the labour exchange as an instrument of labour market organisation, but in fact it was changing managerial practice, underpinned by arbitral tribunals' preference for ongoing contracts of employment, that proved most influential in this regard. However, the other component of the mid-century emergence of unemployment within the context of the Labour Force Framework was the delineation, for the purposes of income support, of the unemployed, temporarily and 'involuntarily' out of work, from those 'voluntarily' without work and hence out of the labour force altogether. It was here that the labour exchange did indeed play a key role.

Proposed unemployment insurance schemes, like any insurance scheme, required safeguards against the hazard of insuring people against events they could themselves wilfully cause — hence the emphasis on 'involuntary' idleness⁵⁹ which attempted to fundamentally refashion ideas around worklessness and the regulation of the

1900 Entry Cohorts' (2000) 18 *Journal of Labor Economics* 573. However, as indicated by my earlier discussion, such enterprises represented the exception rather than the rule.

57 The *Bulletin of Industrial Practice and Personnel Management*, issued by the Department of Labour and National Service, carried over a dozen articles focussing on the problems of high labour turnover in the six years from 1945.

58 See Wright, above n 15, 50-65. Another management response to the tight postwar labour market prevalent in the automotive and steel industries, was to rely on a steady stream of newly-arrived immigrant labour to address the problem of high turnover: Constance Lever-Tracy and Michael Quinlan, *A Divided Working Class: Ethnic Segmentation and Industrial Conflict in Australia*, Routledge & Kegan Paul, London, 1988, pp 103, 196-7; Robert Tierney, 'The Pursuit of Serviceable Labour in Australian Capitalism: The Economic and Political Contexts of Immigration Policy in the Early Fifties, with Particular Reference to Southern Italians' (1998) 71 *Labour History* 137.

59 See, eg, GH Knibbs, *Social Insurance: Report of the Commonwealth Statistician*, Parl Paper No 72, (1910), p 69, which defined unemployment as 'involuntary idleness not due to physical disability nor to degeneracy of the will'.

workless.⁶⁰ The principle governing the Poor Laws had been a Benthamite one of deterrence or 'lesser eligibility', whereby the position of the pauper on relief was to be made less comfortable than that of the lowest paid labourer. The belief was that unless a worker was really unable to obtain work, they would not accept relief under such hard conditions.⁶¹ The labour exchange presented an alternative: 'If all the jobs offering in a trade or a district are registered at a single office, then it is clear that any man who cannot get work through that office is unemployed against his will'.⁶² The means by which the exchange would actually test the 'truth' of a person's claim to be unemployed could, in practice, vary, ranging across formulae such as 'genuinely seeking work' and 'available for work'. All these attempted to distinguish involuntary unemployment from a range of other labour market statuses.

While insurance benefits were generally paid at a low rate relative to standard wages, there was less fear that rates and conditions of relief more generous than the Poor Laws would encourage idleness and malingering if a system of labour exchanges operated. As Mansfield concludes:

The labour exchange is supposed to be capable of so counter posing job-vacancies and the dossiers containing the qualifications of unemployed workers that it can identify individuals 'voluntarily' avoiding work, 'scrounging' or 'malingering' being phenomena created by the imposition of this form of surveillance. Indeed, the 'voluntarily unemployed' did not exist prior to the labour exchange.⁶³

Hence the view put by the Australian Royal Commission on National Insurance that a system of employment bureaux was 'the indispensable basis for the foundations of an unemployment insurance scheme'.⁶⁴

The work test thereby became central to Australia's unemployment benefit system, although it did not displace the principle of lesser eligibility. In arguing for a non-contributory unemployment benefit scheme, financed from a progressive income tax, wartime policy makers in Treasury envisaged a means tested payment set at a flat rate considerably below prevailing wage rates. Yet Treasury was still insistent that the 'one important danger' in establishing a Commonwealth payment, even considerably below prevailing wage rates, was 'that it may weaken or destroy for many persons the incentive to work':

There is only one effective means to prevent malingering and that is by the application of a work test. Wherever a work test has been applied it has proved a

60 Thus economist Arthur Pigou's definition of involuntary unemployment in his 1913 book, *Unemployment*, was largely inspired by Britain's *National Insurance Act* of 1911: see Richard Kahn, 'Unemployment as Seen by the Keynesians' in G D N Worswick (ed), *The Concept and Measurement of Involuntary Unemployment*, Allen and Unwin, London, 1976, 19-20

61 Beveridge, above n 44, 215.

62 Ibid.

63 Malcolm Mansfield, 'The Why Work? Syndrome' (1988) 22 *Social Policy and Administration* 235 at 238.

64 Commonwealth of Australia, Royal Commission on National Insurance, above n 21, 21.

most unpopular measure. Nevertheless it is an essential part of any scheme to guarantee a minimum income to able-bodied workers.⁶⁵

Section 15(c)(ii) and (iii) of the *Unemployment and Sickness Benefits Act 1944* thereby required that the Director-General of Social Services satisfy himself that a claimant for unemployment benefit was ‘capable of undertaking and willing to undertake work which, in the opinion of the Director-General, is suitable to be undertaken by that person’ and that the claimant had ‘taken reasonable steps to obtain such work’. Section 28 of the Act empowered the Director-General to postpone or cancel the payment of benefit if a claimant had become ‘voluntarily unemployed without good reason’; had become ‘unemployed by reason of misconduct’; had ‘failed or refused without good and sufficient reason to accept an offer of employment which the Director-General considers to be suitable’. The administrative procedures intended to ensure claimants met the requirements of sections 15(c) and 28 were referred to as the ‘work test’ or sometimes as the ‘works test’.⁶⁶

The first thing to note about the works test as enacted in 1944 is that it was couched in relatively strong terms. A work test had been at the core of Britain’s unemployment insurance scheme, but it merely spoke of ‘availability’ for work.⁶⁷ In contrast, by insisting, as a condition of benefit, on ‘reasonable steps’ to find work, the Australian legislation sought to more actively mobilise the unemployed as a source of labour supply. In effect, by mobilising the unemployed as clear participants ‘in the labour market’, it provided the juridical and institutional underpinning for the labour force framework that would come to dominate national economic statistics.

A second point concerns the limits that were placed on this mobilisation of the unemployed. In operationalising the work test, the government resolved that all applicants for benefit would be required to register with the CES and to accept any suitable work available which may be offered to them. Failure to accept such work

65 Treasury official Jim Nimmo in evidence before the Parliamentary Committee on Social Security, in Parliament of Australia, Joint Committee on Social Security, *Minutes of Evidence*, Commonwealth Government Printer, Canberra, 1943, pp 234-235.

66 For one of the few accounts to discuss the work test specifically in the context of labour market regulation, see Terry Carney, ‘Contractual Welfare and Labour Relations in the “Contracting” State’ in Andrew Frazer, Ron McCallum and Paul Ronfeldt (eds), *Individual Contracts and Workplace Relations*, Working Paper No 50, ACIRRT, University of Sydney, 1997. Australia’s old age and disability pensions legislation reflected a similar concern with a claimant’s responsibility for his or her current circumstances and their continuation, disqualifying those claimants for invalid pension, for example, whose incapacity was self-induced ‘with a view to obtaining a pension’: *Invalid and Old Age Pension Act 1908* (Cth.) s 22(d). Similarly, the administration of emergency unemployment relief during the Depression incorporated a set of conditions that disqualified claimants who had refused offers of work ‘without reasonable excuse’: see, eg, *Unemployment Relief (Administration) Act 1932* (Vic) s 7(1)(b).

67 Britain had instituted a test based on ‘actively seeking full-time work’ in 1921, but it was dropped in 1930. Beveridge thought that the ‘actively seeking work’ test did not so much catch out the work-shy or malingering man as provide a weapon ‘against claims by women who on marriage had practically retired from industry and were not wanted by employers, but tried, not unnaturally, to get something for nothing out of the fund’. Moreover, he saw the ‘actively seeking work’ formula as undermining his original plan for labour exchanges as it would drive men back into the ‘hawking of labour’ and ‘fruitless journeys’ for work outside the ambit of the exchange: Beveridge, above n 44, 280. The British government reintroduced an ‘actively seeking employment’ requirement in 1989: *Social Security Act 1989* (UK) s 12.

would render them ineligible for benefit. Much hinged, then, on the understanding of what counted as ‘suitable’ work. Employment which was not covered by an award or collective agreement was not considered suitable unless it carried remuneration at least equivalent to the recognised rate. Male claimants less than 19 years of age, female claimants less than 21, claimants residing with dependent children, claimants residing with a pregnant wife or claimants who were themselves pregnant were able to refuse employment which would involve living away from home, unless they were accustomed to undertaking such employment, and all claimants were entitled to refuse work that involved living away from home where the ‘conditions and amenities’ did not reach the standards usually applying to that type of employment. Vacancies which arose as a result of an industrial dispute were also not considered ‘suitable work’ for the purposes of the work test.⁶⁸ However, claimants would be disqualified where work was not available of the type for which they possessed particular experience or qualifications, or for which they had indicated a personal preference, and they refused to accept other employment which the district employment office considered suitable, even should such employment require working outside a trade calling or transfer of union membership.⁶⁹ The result was that ‘a tradesman may be offered a job as a labourer if better paid employment is not available and he is not allowed Benefit if he declines to accept this position, provided the Registrar considers he is capable of undertaking labouring work’.⁷⁰

So the work test mobilised a labour supply, but in a way that was bounded and shaped by a specific labour market and social context. That context included the drive for national development, along with a tight labour market and enhanced worker bargaining power. But it also included certain labour standards — the prevalence of award rates — and certain social mores — particularly the value placed on preservation of ‘home’ life for the traditional family unit. In this way, ‘involuntary’ unemployment can be seen as a social and cultural practice and norm in part constituted by and in part itself reinforcing Australia’s prevailing system of labour

- 68 Conversely, striking workers would not be paid a benefit: *Unemployment and Sickness Benefits Act 1944* (Cth.) s 15(c)(i). On the early operation of this policy, see O’Donnell, above n 9, 366-369; on its statutory evolution, see Joo-Cheong Tham, ‘Industrial Action and Unemployment Income Support’ (2002) 15 *Australian Journal of Labour Law* 40. Technically, this arrangement represented a *quid pro quo* whereby the government and its labour exchange would neither allow unemployment benefits to be used as a de facto strike fund, nor would the labour exchange be used to mobilise strike breakers. In fact, CES procedure was that all job seekers were to be informed of all vacancies for which they were qualified and suitable, but were also to be notified of strikes or black bans where these were on foot. The acceptance of the employment was then to be entirely a matter between the applicant and the employer, and the applicant was not to be influenced by the CES staff either for or against accepting such work. The CES’s neutrality here depended on process. If the applicant were to accept the referral, he or she was to be given no introductory slip by the Service, nor any assistance with transport. Rather disingenuously, the applicant, having just been notified of the vacancy by the Service, was to be ‘regarded as having obtained the employment of his own initiative’: Commonwealth Employment Service, *District Office Manual*, Department of Labour and National Service, Melbourne, January 1949, section 4400.
- 69 Directorate of Manpower, Unemployment and Sickness Benefit Circular No 8, 2 January 1946, National Archives of Australia, Series MP 243/3. See also Commonwealth Employment Service, above n 68, section 10,004.
- 70 W Funnell (Director of Employment) to E Ward (MP), 16 December 1946, National Archives of Australia, Series MP537/1, Item No 251/57/2, ‘Unemployment and Sickness Benefits: Application of the Works Test 1946-1952’.

regulation.⁷¹ That is, unemployment did not refer to an inability to find *any* work but an inability to find work under conditions laid down by regulation. The idea of ‘involuntary’ unemployment therefore clearly still embodied a right to *refuse* work under certain conditions. However, whereas a noteworthy characteristic of trade union out-of-work benefits was the practice of giving financial support to workers engaged in trade disputes, this was not carried over into the new unemployment benefit scheme.⁷² Similarly, whereas trade union out-of-work schemes made it possible for an unemployed person to hold out for a job in their own occupation or trade, under customary conditions, the work test in Australia meant the unemployed could be directed to take up work outside their usual trade, rather than being supported while waiting for ‘better’ work to show up.⁷³ Again, this represents a shift from the notion of stable occupation embodied in the ‘gainful employment’ approach of pre-war censuses, to a more generic understanding of work, characteristic of the new, emerging labour practices and an extensive system of labour regulations and standards. The work test reconstructed the job search from one of looking for work ‘in the trade’ to a more generic search for ‘work’ *per se*. The prevalence of a national system of labour regulation, rather than, say, locally bargained collective agreements, also meant that workers could be more easily expected to be mobile across the uniform space of a protected, national labour market in their search for work. At the same time, the scope of the job search was limited in geographic terms for certain classes of workers — suggesting workers were not seen solely as interchangeable units of labour power, but were also conceived of as constrained by social context, particularly the demands of family life.

A third point, evident in the preceding discussion, is that the legislative articulation of a work test, couched in broad terms of ‘suitable’ work and ‘reasonable’ steps, allows both an inevitable degree of discretion in application at the District Office level,⁷⁴ and considerable scope for the government of the day to expand or contract its requirements, according to prevailing labour market conditions, by altering administrative criteria without changing the legislative provisions themselves.⁷⁵ Thus, for example, although the late 1940s’ direction outlined above demanded claimants be prepared to take up work outside their trade, it was recognised at the time that while some CES officers would apply this aspect of the work test ‘most ruthlessly, others are more humane and will readily endorse the claim form “No suitable employment available”’.⁷⁶ Ultimately, the federal Labor government in May 1973 formally allowed claimants qualified for a certain kind of employment (either by formal

71 *cf.* Walters, above n 9, 64.

72 See above, n 68.

73 See above, n 70.

74 On aspects of the application of the test in the first half of the 1970s, for example, see the discussion in Alan Jordan, *Long Term Unemployed People under Conditions of Full Employment*, Research Report, Commission of Inquiry into Poverty, AGPS, Canberra, 1975, pp 43–47.

75 See *Director-General of Social Services v Thomson* (1982) 53 FLR 356 at 361. This degree of discretion has in turn been identified as a particularly problematic aspect of the legislative provision of a work test: see Commonwealth of Australia, *Unemployment Benefit Policy and Administration: Report of Inquiry*, Parl Paper No 243 (1977), para 4.11.11.

76 HV Evatt (MP) to H Holt (Minister for Labour and National Service), 26 February 1952, National Archives of Australia, Series MP537/1, Item No 251/57/2, ‘Unemployment and Sickness Benefits: Application of the Works Test 1946-1952’.

qualification or experience) not to be required to take work of a lower status.⁷⁷ The official relaxing of the provisions occurred at the tail-end of thirty years of record full employment. It was partially reversed by the Liberal government as unemployment escalated in the mid-1970s.⁷⁸

Importantly for our discussion, up to 1979 the work test was administered in a way that suggested benefit might only be lost through a failure to accept an offer of full-time work (whether or not the job was permanent), leaving people free to refuse offers of part-time work and remain eligible for benefit. In 1979 the rules were altered such that beneficiaries were expected to accept offers of casual, part-time and temporary work so as to satisfy the work test.⁷⁹

Many of the other protections inherent in the notion of 'suitable' work remained in place, and have been spelt out in legislative terms since 1994.⁸⁰ Yet the requirement that the unemployed make themselves available for part-time and casual work represented a significant shift in mobilising them as a labour supply for a more 'flexible' labour market.

Activating the Unemployed

Regulatory reform as regards the work test and the administration of unemployment benefits did not stop there. The 1979 changes may have represented an opportunistic attempt to reduce claimant numbers in a time of rising unemployment. By the second half of the 1980s, however, the idea of mobilising the unemployed became embedded in a more fundamental shift in the policy paradigm, as the idea of the 'Active Society' and 'activating' the unemployed emerged.

'Active' labour market policies had their origins in the postwar policies of the Scandinavian countries directed at workers displaced by technological change. The regulatory innovation in the 1980s, reflected in key OECD documents,⁸¹ was to extend the reach of the 'active' approach to all people of workforce age. The impetus for this shift comes from a mixture of changing social aspirations on the part of those hitherto excluded from the labour force, changed cultural expectations about the worth of participating in paid work, and the desire of governments to contain their welfare budgets in a time of both increased demand for social services and the expectations of fiscal restraint. The approach was largely concerned with the supply-side of the labour market, focussing on the supposed labour-market 'deficits' of those out-of-work.

77 Jordan, above n 74, 46.

78 From March 1976 the definition of 'suitable work' was modified so that skilled workers who had not found an appropriate job within six weeks would be required to accept unskilled work: Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 23 March 1976, pp 871–872.

79 Commonwealth of Australia, *Commonwealth Record*, 4 July 1979.

80 That is, through a legislative definition of what counts as 'unsuitable' work: *Social Security Act 1991* (Cth.) s 601(2A).

81 For articulations of the OECD's 'Active Society' framework, see Organisation for Economic Co-operation and Development, *Employment Outlook*, OECD, Paris, 1987; Organisation for Economic Co-operation and Development; *Employment Outlook*, OECD, Paris, 1989; Organisation for Economic Co-operation and Development; *Employment Outlook*, OECD, Paris, 2003.

The Social Security Review, undertaken from 1986 to 1989, argued for income support payments not to be seen merely as a ‘safety net’ but also as a structure of incentives and assistance to enter or re-enter the workforce or to maintain some form of labour market attachment. This was to apply both to the unemployed and other social security beneficiaries of workforce age. The Review proposed linking increased unemployment payments with an ‘activity test’ and a restructured income test.⁸²

The Activity Test

Under the *Social Security Act 1991*, the old work test was largely retained, but was now able to be extensively supplemented, both by discretionary imposition of legislatively authorised additional ‘requirements’, and by obligations set out in a ‘Preparing for Work Agreement’.⁸³ Where a claimant is required to enter into an Agreement, satisfaction of the Activity Test hinges on the claimant taking reasonable steps to comply with the Agreement, regardless of their compliance with the basic work test.⁸⁴ Apart from requiring the Secretary to the Department of Social Security to take into account the recipient’s capacity to comply with the terms of the proposed agreement and his or her needs,⁸⁵ the legislation did not impose any express restriction on the content of these ‘agreements’.⁸⁶ Thus the new focus on ‘requirements’ meant the ambit of the activity test was capable of significant expansion.⁸⁷ Claimants for unemployment benefit could now be asked to prove their entitlement by undertaking a range of activities apart from looking for full time work, including training, labour market programs or voluntary work likely to improve their

82 See Commonwealth of Australia, Department of Social Security, *Income Support for the Unemployed in Australia: Towards a More Active System*, Issues Paper No 4, Social Security Review, Australian Government Publishing Service, Canberra, 1988

83 *Social Security Act 1991* (Cth.) s 601. The work test was rephrased from the requirement that an applicant be willing to undertake suitable work as well as take reasonable steps to secure such work to the requirement that he or she be willing to undertake suitable work and actively seek such work. The removal of the ‘reasonableness’ criteria significantly alters the application of the work test: *Spencer v Secretary, Department of Social Security* (1998) 83 FCR 306; *Castleman v Secretary, Department of Social Security* (1999) 29 AAR 458. However, as the subsequent discussion indicates, the new legislative capacity to impose additional ‘requirements’ on job seekers expands the range of activity that may be demanded as a condition of receipt of benefit, while the determination of whether the claimant has taken ‘reasonable steps’ to comply with a requirement merely reintroduces the discretionary element of ‘reasonableness’ that has been removed from the work test.

84 *Social Security Act 1991* (Cth.) s 601(5).

85 *Social Security Act 1991* (Cth.) s 606(2)-(4).

86 There were, however, ‘minimum-content’ requirements: *Social Security Act 1991* (Cth.) s 606(1). Delay in negotiating an agreement entitles Centrelink to issue a notice which has the effect of deeming a person to have failed to enter an agreement: *Social Security Act 1991* (Cth.) s 607. This may occur where the person has unreasonably failed to attend the relevant appointment, reply to correspondence about it, or agree to the terms proposed. On procedural steps see: *Re Bartlett and Secretary, Department of Social Security* (1994) 19 AAR 398 [33 ALD 661].

87 The earliest example of this growth was the power conferred on the Secretary of the Department of Social Security to require a recipient of either the Newstart Allowance or the Job Search Allowance to apply for a particular number of advertised job vacancies as part of the activity test: *Social Security (Budget and Other Measures) Legislation Amendment Act 1993* (Cth.). In 1997, the Secretary of the Department of Social Security acquired an additional power to require recipients of the Newstart Allowance to participate in an ‘approved program of work’ — commonly known as the ‘Work for the Dole’ program — as a condition of the activity test: *Social Security Legislation Amendment (Work for the Dole) Act 1997* (Cth.).

prospects of finding work, or developing a self-employment venture, or any other activity likely to reduce labour market disadvantage.

Differing penalties in terms of the percentage reduction in rate payments apply to claimants who fail to meet their obligations (over a 13 week period in the case of 'administrative' breaches or 26 weeks in the case of 'activity test' breaches). A third activity test breach within 2 years attracts total loss of all payments for a period of 8 weeks. The 2005 Budget announced that from July 2006 payments would simply be suspended until compliance is achieved, with payments resuming from the date of compliance and capped at a maximum of 8 weeks.

The Means Test

Just as, prior to 1979, there was no compulsion to accept part-time work, there was no monetary incentive: the means test allowed only a very small 'free area' of allowable income and no tapered withdrawal, so earnings from even a minimal amount of part-time work would usually mean foregoing the unemployment benefit.⁸⁸ Across the next decade or so, the income test was altered. In particular, there have been changes to the 'earnings disregard' threshold which governs the amount a person can earn before the income test is applied; the taper or rate at which the benefit is withdrawn as earned income increases; and an earnings credit scheme (subsequently abolished by the Coalition government then reinstated under the new name of 'transition bank') which allowed a credit to be offset against income from employment, as was a waiver of waiting periods for clients reclaiming their allowance within 13 weeks of losing entitlement.

The Role of the Job Network

In 1994 the Labor government's *Working Nation* policy saw an expansion of the idea of individual case management for the long-term unemployed, with the important innovation that unemployed clients were given the choice of either public sector or accredited independent case management providers. This limited application of a contestable market in case management services gave way, under the Coalition government, to a contestable market in employment services more generally, including job brokerage and other forms of assistance.⁸⁹ Thus in May 1998 the government fully privatised the public employment service in Australia, replacing the Commonwealth Employment Service with a network of contracted private agencies. Centrelink, a government agency, is now the initial point of contact for people seeking access to Commonwealth funded employment services including income support payments. As well as maintaining a National Vacancy Database accessible through touch screens, Centrelink undertakes the registration and classification of those claiming income support payment for unemployment and the referral of claimants to Job Network members for employment services. Classification proceeds by job seekers completing a 'Job Seeker Classification Instrument' (JSCI) which

88 For example, in 1969 allowable income for an adult was raised from \$2 to \$6 a week: TH Kewley, *Social Security in Australia 1900-72*, Sydney University Press, Sydney, 1973, p 458.

89 For a fuller account, see Anthony O'Donnell, 'The Public Employment Service in Australia: Regulating Work or Regulating Welfare?' (2000) 13 *Australian Journal of Labour Law* 143 at 156-162.

seeks to measure a job seeker's relative labour market disadvantage and to identify the type of employment assistance a client might require. Questions cover factors such as age, education, recent work experience, geographical location, language and literacy and so on and each factor is assigned a numerical weighting, with the score recalculated over time at specified intervals.⁹⁰ On this basis, the job seeker can be referred to different levels of assistance.

The relationship between the Commonwealth (i.e., the Department of Employment and Workplace Relations) and the provider is governed by a contract, arising out of a tender process. Successful tenderers must also abide by a formal Code of Conduct, encompassing principles such as 'ethical, respectful and fair treatment' of job seekers, 'accurate and relevant information', 'prompt courteous service', 'privacy and confidentiality' and 'responsible advertising'. Job Network agencies receive differing levels of remuneration according to the ease or difficulty of finding work for various classes of unemployed person, with a partial advance payment for the most disadvantaged clients requiring intensive assistance. There are no specific programs which provider agencies must provide. When tendering to provide intensive assistance, agencies must submit a Declaration of Intent outlining their general strategy for providing assistance, but the actual techniques are left to the agencies' discretion.⁹¹ Once a job seeker is referred for intensive assistance, the agency must negotiate a Preparing for Work Agreement with the job seeker. Agencies must then inform Centrelink of any breaches of an Agreement signed by a job seeker, with Centrelink deciding whether a job seeker is thereby disqualified from benefits.⁹²

Reconstituting the Labour Market: Some Regulatory Effects of Welfare Reform

Reforms to both the work test and the means test indicated a pragmatic recognition of labour market change, especially the fact that most new jobs since the late 1980s have been part-time and that there has been a decline in the probability of leaving unemployment for full-time work and an increase in the probability of leaving unemployment for part-time work. Yet this is not only due to the increase of such jobs in the labour market at large, but also because the profile of employment opportunities available to welfare participants is likely to be dominated by casual jobs precisely because these jobs turnover more frequently than those in the primary sector. The take-up of such options is being encouraged by a more flexible income test as well as the requirement that beneficiaries take up the first 'suitable' job offered, with

90 The reliance on a scoring system also gives the government scope to at any time lift the JSCI threshold at which job seekers are classified as highly disadvantaged, so as to either reflect improved labour market conditions or rein in government spending in this area, or both: see *2005–06 Budget Paper No 2: Budget Measures 2005–2006*, Commonwealth of Australia, Canberra, 2005. For some unemployed, the JSCI is supplemented by a secondary classification process through 'special needs assessment' usually undertaken by occupational psychologists and triggered by observations of Centrelink customer service staff, guided by a list of observable behaviours such as inappropriate eye contact, poor hygiene, inappropriate make-up application, appearance not in keeping with peers, inability to communicate effectively and so on: see Catherine McDonald, Greg Marston and Amma Buckley, 'Risk Technology in Australia: The Role of the Job Seeker Classification Instrument in Employment Services' (2003) 23 *Critical Social Policy* 498 at 506.

91 Commonwealth of Australia, Department of Employment, Workplace Relations and Small Business, Job Network, Draft Contract, May 1998, Part D, cl 2.4.

92 Ibid, Part D, cls 3.5-3.6.

‘suitability’ fairly broadly defined (or, rather, ‘not suitable’ fairly narrowly defined). Re-entry to the labour force is now likely to be characterised by a combination of part-payment of unemployment benefits and earnings from part-time work over a lengthy period.

The encouragement to take up part-time, short-term and casual work is based on the premise that such work will provide a stepping stone to more secure, full-time work. Yet we don’t know the circumstances under which such a transition occurs. There is some evidence that receipt of part-benefit with earnings from part-time work increases the likelihood of ultimate exit from benefit.⁹³ At the same time, longitudinal data indicates a very significant degree of churning.⁹⁴ If this is the case, then the retained unemployment benefit is not compensation for unemployment, but compensation for *underemployment*.

Moreover, the evidence of churning suggests there might be a mutually reinforcing relationship between new directions in unemployment policy and prevailing employment trends such as the proliferation of casual or low-quality part-time work. At best, then, as Jamie Peck and Nik Theodore have pointed out in the context of similar welfare policies pursued by the British and United States’ governments, such approaches tend to work with the grain of prevailing labour market trends and accept as given established systems of recruitment and labour management.⁹⁵ Employers’ definition of job-readiness may permeate the internal structure of job assistance programs, with case managers working from an ideal of the ‘good’ job seeker: people that are keen to do ‘any job’, who express humility through a willingness ‘to take entry level positions’ and who both cold canvass employers and make assiduous and visible use of Job Network agency facilities.⁹⁶

However, an equally important factor here may be merely the size of case loads and the pressure on case managers to obtain outcomes. In particular, the Coalition government’s cut backs to training programs sent a strong message to all Job Network contractors to focus their efforts on rapid, low cost movement of clients into job search.⁹⁷

93 Paul Flatau and Mike Dockery, *How Do Income Support Recipients Engage with the Labour Market?*, Policy Research Paper No 12, Department of Family and Community Services, Canberra, 2001.

94 Anh Le and Paul Miller, *Job Quality and Churning of the Pool of the Unemployed*, ABS Occasional Paper, Cat. No 6293.0.00.003, Australian Bureau of Statistics, Canberra, 1999; Yvonne Dunlop, *Labour Market Outcomes of Low Paid Adult Workers*, ABS Occasional Paper, Cat. No 6293.0.00.005, Australian Bureau of Statistics, Canberra, 2000.

95 Jamie Peck and Nikolas Theodore, “‘Workfirst’: Workfare and the Regulation of Contingent Labour Markets’ (2000) 24 *Cambridge Journal of Economics* 119.

96 Greg Marston and Catherine McDonald, ‘The Psychology, Ethics and Social Relations of Unemployment’ (2003) 6 *Australian Journal of Labour Economics* 293 at 304. The job seeker client who, by contrast, goes against the understanding that ‘any job is better than no job’ is negatively characterised by case managers as ‘a job snob’: *ibid*.

97 As one agency staff member has put it: ‘All the assessment stuff we used to do [under earlier *Working Nation* case management procedures] has pretty much gone by the board now...To be honest we can’t really tell why some get good jobs and others don’t so we just try to keep them all moving along and hope about a third will do something’ Mark Considine, *Enterprising States: The Public Management of Welfare-to-Work*, Cambridge University Press, Cambridge, 2001, p 136; on the withdrawal of training programs, see p 138.

Whatever the cause, the result is the avoidance of any positive action to reconstruct recruitment and the distribution of work, which was, after all, Beveridge's vision for the labour exchange. In this way, at least, employer definitions of what is appropriate employment — and appropriate attitudes to employment amongst welfare recipients — permeate the market.

Rather than being merely reactive, there is also the possibility that unemployment benefit administration may actively reconstruct either or both of the supply side and the demand side of the labour market. On the supply side, it is an avowed aim of 'activation' policies to reshuffle the jobless 'queue' by making the long-term unemployed as 'job ready' as the more recently unemployed.⁹⁸ Yet here, rather than a random reordering of the job queue, welfare interventions may entrench or amplify inequalities, to the extent especially, in Australia, that the Job Network payment system structures a hierarchy of interventions. Early analysis of the initial fee structure put in place in 1998 suggested that the most profitable option for some Job Network agencies would be to take on referred disadvantaged clients without providing any meaningful assistance, with the service remaining viable on the basis of the steady stream of upfront payments that accompanied the referrals together with outcome payments for more easy to place clients.⁹⁹ The initial departmental evaluation of the Job Network presented evidence that some providers did organise their activities on this basis, and left open the question as to whether the fee structure was providing an incentive *not* to offer assistance to all eligible job seekers.¹⁰⁰ Outside of the fee structure, as I've already suggested, it is the pressure of the sheer number of clients, together with the new role for contractors under Job Network to convince employers to lodge vacancies with them that means many case managers cannot genuinely offer individualised assistance to hard-to-place job seekers. Staff appears to be selecting the most job-ready in their case load and moving them quickly into job search activity.¹⁰¹

Restructuring of the demand side of the labour market may also occur as a result of the institutional setup of the Job Network which structured payment for placements in work with thresholds of 15 hours per week for 13 or 26 weeks. There was thereby an incentive for Job Network agencies to deliberately 'split' jobs to create multiple short duration placements which are not related to the time constraints of the employer but which maximise outcome fees. With the increasingly common association between job placement agencies and labour hire or temporary help agencies, it became

98 This also is meant to serve a macroeconomic purpose: as economist Richard Layard, a key architect of 'welfare to work' policies in Britain, has put it, unemployment is necessary to 'restrain wage pressure by providing employers with a pool of workers to fill vacancies'. But long-term unemployment 'appears to be largely useless' as employers don't view the long-term unemployed as potential employees. Hence the aim of policy is to take the long-term unemployed and make them appear the same as the short-term unemployed: see Richard Layard, 'Preventing Long-Term Unemployment' in John Philpott (ed), *Working for Full Employment*, Routledge, London, 1997, p 190.

99 Don Harding, 'What Incentives Does Job Network Create?' [1998] *Mercer-Melbourne Institute Quarterly Bulletin of Economic Trends*, No 4, 40.

100 Commonwealth of Australia, Department of Employment, Workplace Relations and Small Business, *Job Network Evaluation Stage One: Implementation and Market Development*, Evaluation and Program Performance Branch Report 1/2000, Department of Employment, Workplace Relations and Small Business, Canberra, 2000, pp 87-89; see also Productivity Commission, *Independent Review of the Job Network*, Report No 21, Ausinfo, Canberra, 2002, and Considine, above n 97, 125, 140.

101 See above n 97.

possible for labour hire companies associated with the Job Network agencies to employ jobseekers who then undertook work, through short duration placements, for the Job Network agency itself.¹⁰²

Thus, we can echo Peck and Theodore's summation concerning US welfare-to-work programs: that such programs not only exploit conditions found in contingent labour markets, but contribute to the regulation and reproduction of such markets, most obviously by constructing a continuously job-ready, pre-processed secure labour supply for insecure work. In this way the new unemployment policy operates 'to make flexible labour markets work'.¹⁰³

New Regulatory 'Fixes'

It is clear from the foregoing discussion that shifts in the *impact* of unemployment benefit administration on the constitution of labour supply are also linked to shifts in regulatory *forms*. The regulatory work in constituting and mobilising the unemployed as a labour supply under the mid-century scheme was largely done by a clear legislative statement of entitlement (the work test), supplemented by policy and procedure manuals and circulars and a degree of office-level discretion. While the re-definition of 'suitable' work, a category always capable of contraction or expansion, has contributed to a new mobilization of the unemployed as a low paid, insecure workforce, as has manipulation of the means test, such a mobilization has also taken place within the context of a set of quite novel regulatory strategies or techniques:¹⁰⁴ an expanded 'activity test', a focus on agreement making, risk assessment through the JSCI and the mobilization of private agencies through the Job Network.

The fundamentally coercive or disciplinary power of the state to mobilize the unemployed for work — including, now, for part-time and casual work and, through Agreements, self-employment or voluntary work — has clearly not been undermined by such regulatory innovation, but merely clothed in a new rhetoric of contractual negotiation and risk management. The process remains somewhat one-sided, with arbitrary power retained by state agencies, while the range of labour market activities — and the intensity of basic job search activity — required of the unemployed claimant has been vastly increased. In turn, the new processes of governance have been integrated into a reinforcing sanction regime, with some commentators suggesting such a regime now functions as a 'quasi-criminal' one, whereby the failure of the job seeker to comply with the terms and conditions of his or her 'agreement'

102 A celebrated case involved a Job Network member who also ran a labour hire firm bulk recruiting job seekers through the firm to conduct job search for themselves for 15 hours over five consecutive days — the minimum requirement for the agency to get its outcome payment. A departmental inquiry found no fraudulent intent on the part of the agency but observed that the 'practice of paying (and claiming a fee) for employing a job seeker to undertake their own job search activity is contrary to contractual requirements, is a breach of the Code of Conduct and has the potential to bring the Job Network into disrepute': Sheila Butler and Peter Bache, *Report of Enquiry Arising from Senate Estimates Hearings on 4-5 June 2001 into Matters Concerning Job Network*, Department of Employment, Workplace Relations and Small Business, Canberra, 2001, para 26.

103 Peck and Theodore, above n 95, 123.

104 On regulatory techniques, see Anthony Ogus, *Regulation: Legal Form and Economic Theory*, Oxford University Press, Oxford, 1994; Peter Vincent-Jones, 'The Regulation of Contractualisation in Quasi-Markets for Public Services' [1999] *Public Law* 304.

assumes the character of ‘an offence...against a publicly maintained code of behaviour, albeit one which is couched in contractual form’.¹⁰⁵

Although now couched in terms of ‘case management’ and ‘helping’ the unemployed, it is also clear that a key function of the expanded activity test and the focus on agreement making remains the separation of the ‘genuinely’ unemployed from the malingerer. Yet this task is now undertaken in the context set by a macro-economic policy premised on the neo-liberal belief in naturally clearing markets and hence the implicit rejection of the very idea of ‘involuntary’ unemployment. The focus is on the supply-side, the physical and psychological deficits of the unemployed themselves.¹⁰⁶ Hence an array of new regulatory ‘fixes’.

One example of these is the shift to risk management approaches associated with case management techniques which, from *Working Nation* onwards, moved beyond their traditional niche in social work practice to become a core response to unemployment in Australia.¹⁰⁷ Case management approaches are in turn triggered by the JSCI (a variety of which was also first used in *Working Nation*), which proceeds on the assumption that the unemployed population can be abstractly classified according to a fine grid of sub-populations in order to assess probabilities of long-term unemployment.¹⁰⁸ Importantly, despite the privatization of employment services and the significant delegation of powers to Job Network agencies, the JSCI is applied by Centrelink staff and so the government, rather than the unemployed person or the Job Network agency, determines the level of assistance offered to the unemployed person. Administration of the JSCI is heavily proceduralised and automated, and so theoretically minimizes the discretionary capacity of Centrelink employees (which, in turn, is expected to minimize costs associated with mis-classifying clients and delivering inappropriate or unnecessary assistance).¹⁰⁹ Yet office-level discretion or

105 Mark Freedland and Desmond King, ‘Contractual Governance and Illiberal Contracts’ (2003) 27 *Cambridge Journal of Economics* 465 at 475–6. On the prevalence and impact of sanctioning in the Australian system, see ACOSS, *Breaching the Safety Net: The Harsh Impact of Social Security Penalties*, Australian Council of Social Services, Sydney, 2001.

106 Marston and McDonald, above n 96, 303. Aspects of what Marston and McDonald refer to as the ‘physical and mental hygiene’ of job seekers has arguably preoccupied administrators since the unemployment benefit scheme’s inception. However, the policy originally adopted was that postponement or termination of benefit could not be justified ‘on the grounds that a person unwilling to make himself presentable to employers is not taking reasonable steps to obtain work’: W Funnell (Director of Employment) to Director General of Social Services, 5 March 1947, National Archives of Australia, Series MP537/1, Item No 251/57/2, ‘Unemployment and Sickness Benefits: Application of the Works Test 1946-1952’. The policy was reversed in 1976: see Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 23 March 1976, p 870.

107 Of course, mid-century social insurance responses to unemployment also incorporated notions of risk, but here I am drawing on the distinction between what Mitchell Dean calls different ‘epistemes’ of risk, distinguishing between actuarial or ‘insurance risk’ from ‘case management risk’ which is operationalised through the interpersonal practices of human service professionals: Mitchell Dean, *Governmentality: Power and Rule in Modern Society*, Sage, London, 1999.

108 Paul Henman, ‘Targeted! Population Segmentation, Electronic Surveillance and Governing the Unemployed in Australia’ (2004) 19 *International Sociology* 173 at 181.

109 McDonald et al., above n 90, 508. Centrelink staff use a standardised screen-based application, with questions asked verbatim, and ‘best-practice’ time protocols establish how long the assessment should take: *ibid*, p 506. This strict standardisation represents an attempt to limit the discretion inherent in what Michael Lipsky famously termed the ‘street level bureaucracy’ often associated with delivery of human services: see Michael Lipsky, *Street-level Bureaucracy: Dilemmas of the Individual in Public*

providers' subjective assessments cannot be entirely eliminated: first, the JSCI relies on self-disclosure, and the extent of non-disclosure, especially as regards personal characteristics such as drug or gambling addiction, quite obviously increases the risk of a 'classification error',¹¹⁰ and secondly, while many of the 'risk factors' identified by the JSCI derive from statistical profiling regarding labour market barriers, the instrument also includes a number of secondary characteristics that were essentially derived from the opinions of 'experts' (case managers, occupational psychologists etc).¹¹¹

The psychological or therapeutic discourse that comes to dominate the regulation of the unemployed in this regard, along with the focus on agreements and risk identification, produces a sense that case managers are working *with* rather than *over* the unemployed.¹¹² This could be classed as a form of micro-level reflexive or self-regulation. Regardless of whether this is a more 'effective' way of regulating the unemployed as labour market participants, it may work to mask the coercive and disciplinary nature of the regulatory regime.

A notable exception to these new regulatory rationalities I've outlined is the Coalition government's Work for the Dole scheme,¹¹³ which reconfigures recipients' income support payments as a notional 'wage', at minimum award rates, for undertaking around 15 hours of work each week with community organizations. On the one hand, the Work for the Dole scheme more completely mobilizes the unemployed as labour market participants than any other aspect of the current employment services regime. That is, rather than making job search, training, rehabilitation or voluntary work a condition for receipt of benefit, 'waged' work itself becomes the condition. Also, like other services for the unemployed, the Work for the Dole scheme is targeted at particular classes of job seeker. Since its introduction in 1997, when young people aged between 15 and 24 who were unemployed for at least 12 months were targeted, provisions have been extended so that now benefit recipients aged 25 to 49 years are compulsorily referred to the program if they are not in education or training after six months unemployment, and school leavers after three months unemployment. Yet the targeting of the scheme seems not so much driven by the notions of labour market 'risks' underpinning the JSCI, but rather by a political or moral rationality based around the government's understandings of 'mutual obligation' and 'welfare dependency'.¹¹⁴

Services, Russell Sage, New York, 1980; Mark Bouvens and Stavros Zouridis, 'From Street-level to System-level Bureaucracies: How Information and Communications Technology is Transforming Administrative Discretion and Constitutional Control' (2002) 62 *Public Administration Review* 174.

110 Productivity Commission, above n 98, at 9.2.

111 McDonald et al., above n 90, 509–511.

112 Marston and McDonald, above n 96, 311.

113 See above n 87.

114 See Henman, above n 108, 185; Judith Bessant, 'Civil Conscriptio or Reciprocal Obligation?' (2000) 35 *Australian Journal of Social Issues* 15. On popular support for attaching different types of conditionality and obligation to social security benefits, see Tony Eardley, Peter Saunders and Ceri Evans, *Community Attitudes Towards Unemployment, Activity Testing and Mutual Obligation*, Discussion Paper No 107, Social Policy Research Centre, University of New South Wales, Sydney, 2000. Given that the development and expansion of the Work for the Dole program seems driven primarily by a particular type of political and moral rationality, it is perhaps unsurprising that the program actually seems to have substantial *adverse* effects on participants' successful transition out of unemployment, presumably through suppressing actual job search activity: Jeff Borland and Yi-Peng

The reconfiguration of the means test and the new centrality it is given in ‘activating’ the unemployed also relies on an image of the job seeker as a rational, self-maximising individual, which arguably sits uneasily with the emphasis on the physical and psychological deficits of the unemployed.¹¹⁵ Also, financial incentives may actually have little or no behavioural impact, a point suggested by both Australian and British studies. These show that most claimants are unaware of how the income test actually works (and generally perceive it as harsher than it actually is). Claimants’ attachment to the labour force tends to be based primarily on their preference for certain types of work and, for sole parents, on the significance attached to the parenting role.¹¹⁶ Claimants also tend to place more importance on the perceived sense of financial security and stability provided by benefits than the intermittently higher income that may come from accepting short-term or casual work.¹¹⁷ Ultimately, with regard to unemployment benefits as opposed to other income support payments, the pressure of a work test and various activity ‘requirements’ obviates a strong reliance on financial incentives as an activating measure.

Finally, there is the ‘marketisation’ of employment services, incorporating contractual relations and fee structures whereby the government attempts to ensure providers respond to commercial imperatives to ensure their long term survival and to impose certain standards on service providers. Yet these provide a particularly blunt instrument for achieving this purpose: we have seen that it can be difficult to get the incentive structure right so as to prevent agencies either ignoring hard-to-place clients¹¹⁸ or undertaking bogus job creation so as to maximise outcome payments in the immediate term.¹¹⁹ More problematic is the use of contractual relations to enshrine performance standards and enhance the *quality* of services provided by particular operators. Despite the plethora of contractual requirements, the formal part of the relationship between job seeker and agency is less structured than before.¹²⁰

As one commentator has put it, officials acting within this new public/private hybrid model can resemble nothing so much as ‘a new class of franchisees’, their goals carefully prescribed, but their routines and methods kept open and flexible to allow for the possible effects of their own self-enterprising efforts.¹²¹ For Collins, using the

Tseng, *Does ‘Work for the Dole’ Work?*, unpublished paper, Department of Family and Community Services, 2003.

115 Thus even conservative critics of the postwar welfare state are divided between those who, like Charles Murray, argue that the welfare state gives the poor the wrong incentives and those who, like Laurence Mead, argue that the problem with the poor is that they don’t respond rationally to incentives, and so require paternalistic interventions in the form of a mixture of ‘help and hassle’.

116 See, eg, Anne Puniard and Chris Harrington, ‘Working Through the Poverty Traps: Results of a Survey of Sole Parent Pensioners and Unemployment Beneficiaries’ (1993) *Social Security Journal* (December) 1; Sally Cowling, *Understanding Behavioural Responses to Tax and Transfer Changes: A Survey of Low-Income Households*, Working Paper No 15/98, Melbourne Institute of Applied and Economic Research, University of Melbourne, 1998; Simon Duncan and Rosalind Edwards, *Lone Mothers, Paid Work and Gendered Moral Rationalities*, Macmillan, Basingstoke, 1999.

117 Eithne McLaughlin, ‘Work and Welfare Benefits: Social Security, Employment and Unemployment in the 1990s’ (1991) 20 *Journal of Social Policy* 485.

118 See above nn 99–100.

119 See above n 102.

120 Considine, above n 97, 125.

121 *Ibid*, p 172.

terms of contracts to fix the content of a public service is akin to the use made formerly of administrative rules, circulars and decisions: 'The difference between self-regulation through contracts and self-regulation through administrative rules seems negligible'.¹²² In fact, in the case of administration of unemployment policy, a major change is clear: unlike under the regime of administrative law, the citizen using the service has no legal right to enforce compliance with the terms of a service provision contract. Provisions in the Job Network Code of Conduct requiring agencies to adhere to principles of privacy legislation are only binding between the Commonwealth and the Job Network members; privity of contract prevents job seekers enforcing these and other responsibilities imposed under the Job Network contracts.¹²³

Conclusion

In this paper I have charted the emergence and consolidation of the 'unemployed' as a robust administrative category in the mid-twentieth century, constituted by the social security system and its administrative practices and reinforced by a particular way of constituting the employment relationship. This enabled the unemployed to be mobilised as a labour supply for a labour market that had become constituted around a generic idea of 'work' as full-time employment. This state of affairs contrasted with the situation prevailing earlier in the century, which saw on the one hand a confusion between unemployment and underemployment, and trade union 'out-of-work' schemes where work was defined with reference to trade or craft skills and trade union bargaining tactics. The regulatory work in constituting and mobilising the unemployed as a labour supply within the mid-century scheme was largely done through a clear legislative entitlement (the work test), supplemented by policy and procedure manuals and circulars and a degree of office-level discretion.

More recently we have witnessed a return to earlier patterns of labour market organisation, whereby it is again difficult to distinguish between the unemployed worker and the intermittent or casual worker. Benefit claimants, alternating between short-term or intermittent employment and periods of unemployment, now earn significant amounts of earned income, often fluctuating over time, while still accessing all or part of an unemployment benefit.¹²⁴ Yet the current policy response represents a noteworthy and ironic departure from the past. If for Beveridge and his peers this type of chronic underemployment bred unemployability, the administration and incentive structure around unemployment benefits has now been explicitly turned around 'to foster the type of labour market [Beveridge] was most concerned to

122 Hugh Collins, *Regulating Contracts*, Oxford University Press, Oxford, p 305.

123 Kate Owens, 'The Job Network: How Legal and Accountable are its (Un)employment Services?' (2001) 8 *Australian Journal of Administrative Law* 49 at 59. Even the government is limited in its enforcement mechanism to termination of the contract, which is likely to be only rarely used: Nicholas Seddon, *Government Contracts: Federal, State and Local*, 2nd ed, Federation Press, Sydney, 1999, p 19. On the challenge the new regime produces for welfare lawyers' traditional reliance on administrative law, see Terry Carney, 'A Workforce-Social Security Interface for a Postmodern World?', Paper presented to the Law and Society Conference, Griffith University, 13-14 December 2004.

124 See Le and Miller, above n 94; John Landt and Jocelyn Pech, 'Work and Welfare in Australia: The Changing Role of Income Support', Paper presented at the Australian Institute of Family Studies Conference, Sydney, 24-26 July 2000.

destroy'.¹²⁵ To this end, a quite novel array of techniques have been brought into play to supplement the expansion of the work test.

Yet if the line between unemployment and employment has been blurred, so to has that between unemployment and other forms of worklessness. The array of now familiar social policy practices and regulatory interventions associated with 'Active Society' approaches — case management, 'preparing for work agreements', risk assessment and so on —tend now to be directed not just at the formally unemployed but at groups such as lone parents and the disabled as well.¹²⁶ That is, worklessness more generally has become of increasing concern to policy makers, especially to the extent that an increased proportion of the jobless appear to be concentrated within households which are living in poverty and making increased claims on the income support system.¹²⁷

Moves toward 'active' income support in the 1980s did not upset the basic categorical system that has been the hallmark of the Australian system for most of the twentieth century. By contrast, the Government is again floating the abolition of the categorical system in favour of a single payment for all people of workforce age.¹²⁸ A single payment, and its underpinning administrative and juridical arrangements, would be the next phase in a fundamental reconstitution of the labour market and of who is 'in' and who is 'out', carrying forward the assumption, as never before, that *all* people of workforce age are potentially, indeed continuously, participants in the labour market.

125 Whiteside, above n 9, 66.

126 See *2005–06 Budget Paper No 2: Budget Measures 2005–2006*, Commonwealth of Australia, Canberra, 2005.

127 See, eg, Reference Group on Welfare Reform, *Participation Support for a More Equitable Society*, Department of Family and Community Services, Canberra, 2000.

128 Commonwealth of Australia, *Building a Simpler System to Help Jobless Families and Individuals*, Department of Family and Community Services, Canberra, 2002, p 13. The idea has an established pedigree within the Commonwealth Department: see Department of Social Security, *A Common Payment? Simplifying Income Support for People of Workforce Age*, Policy Discussion Paper No 7, Canberra, 1995; Reference Group on Welfare Reform, *ibid*. In the light of the vaunted crisis of early retirement and attempts to address the falling labour market participation rates of mature age Australians, the continued emphasis on a policy built around 'workforce age' as something distinct from retirement policy, might prove increasingly difficult to sustain.