THE RISE OF INDIVIDUALISM AND THE IMPLICATIONS FOR THE REGULATION OF WORKPLACE DISPUTES

Julian Teicher

Bernadine Van Gramberg

Greg Bamber

Brian Cooper

Introduction

- Individualisation of the employment relationship has been much discussed, often in the context of the spread of neo-liberalism.

- While the process of individualisation is most obvious in the LMEs, its manifestations are found in what are usually considered to be CME`s.

- Our focus is on individualism and dispute resolution particularly in the context of Australian industrial tribunals.

- We contend that this has special relevance for many European nations.

The research questions

1. What is the evidence of a shift to individualisation of the expression of workplace conflict including at the level of industrial tribunals?

2. What has been the role of human resources management (not necessarily HR managers) in managing these forms of conflict?

3. Why do some disputes fail to be resolved at the workplace level and move to tribunals for assistance in their settlement?

4. In view of the increasing volume of individual disputes coming before tribunals, at least in Australia and Britain, how are these institutions responding?

Our research data

- Published data including on workplace conflict and its resolution (later hopefully including EU countries) (RQ1)
- An Australia wide survey of 1400 managers responsible for the HR function in organisations with at least 20 workers (RQ2)
- Semi-structured interviews with 25 present and former members of the Australian national industrial tribunal, now called Fair Work Australia (RQ3 & 4)

The argument briefly stated

- In international employment relations individualisation can be discerned across a range of countries.

- Evidence can be found in multiple indicators, most readily captured in declining collective manifestations and increasing individual manifestations of conflict.

- Individual manifestations include the realm of dispute resolution both at the workplace and in the context of tribunals.

- Among the LME group this process is well advanced in Australia where it has occurred against the backdrop of the survival of a heavily juridified system of employment relations.

  - Australia as a hybrid LME
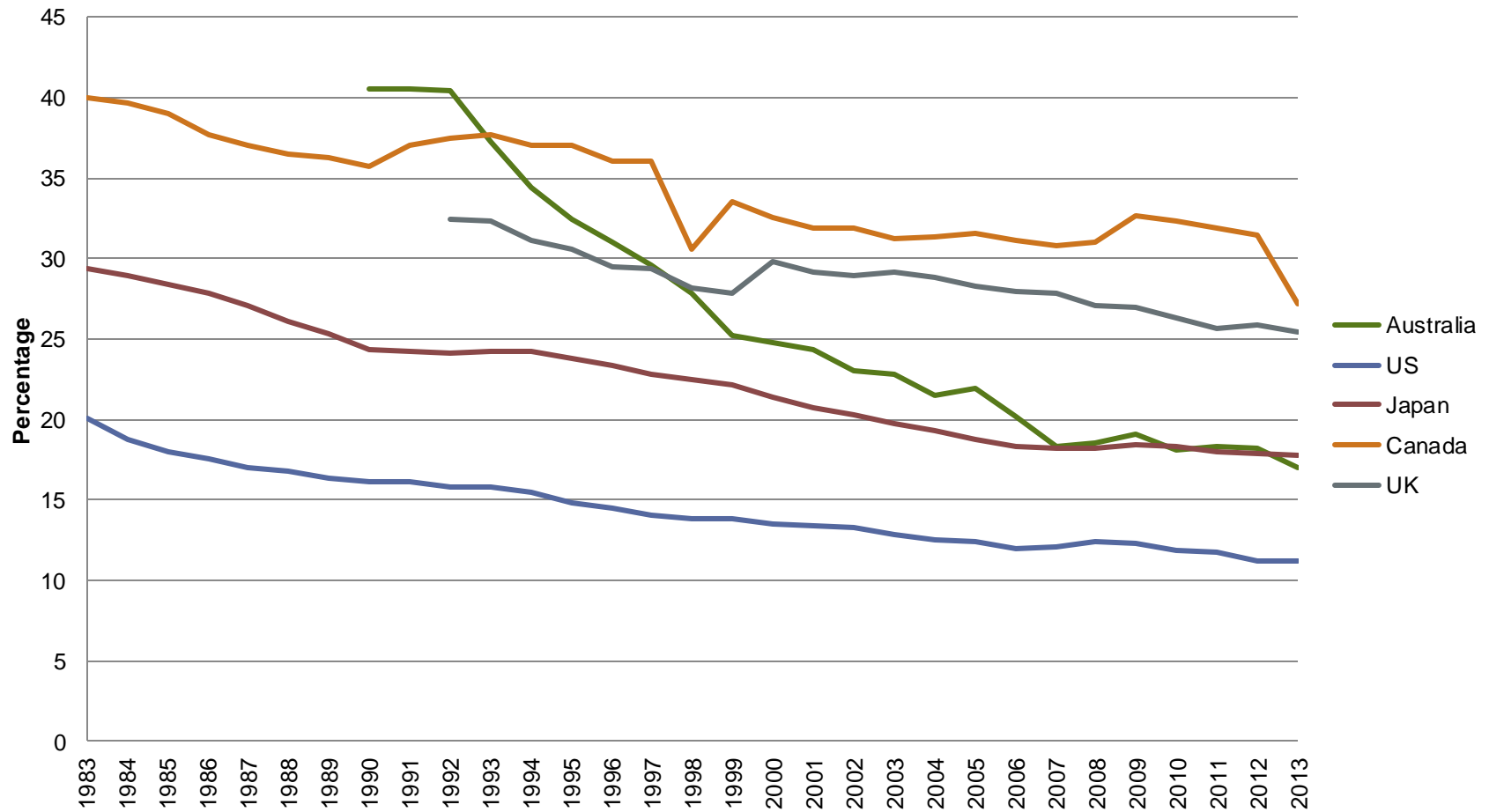
Declining collective action: Australia
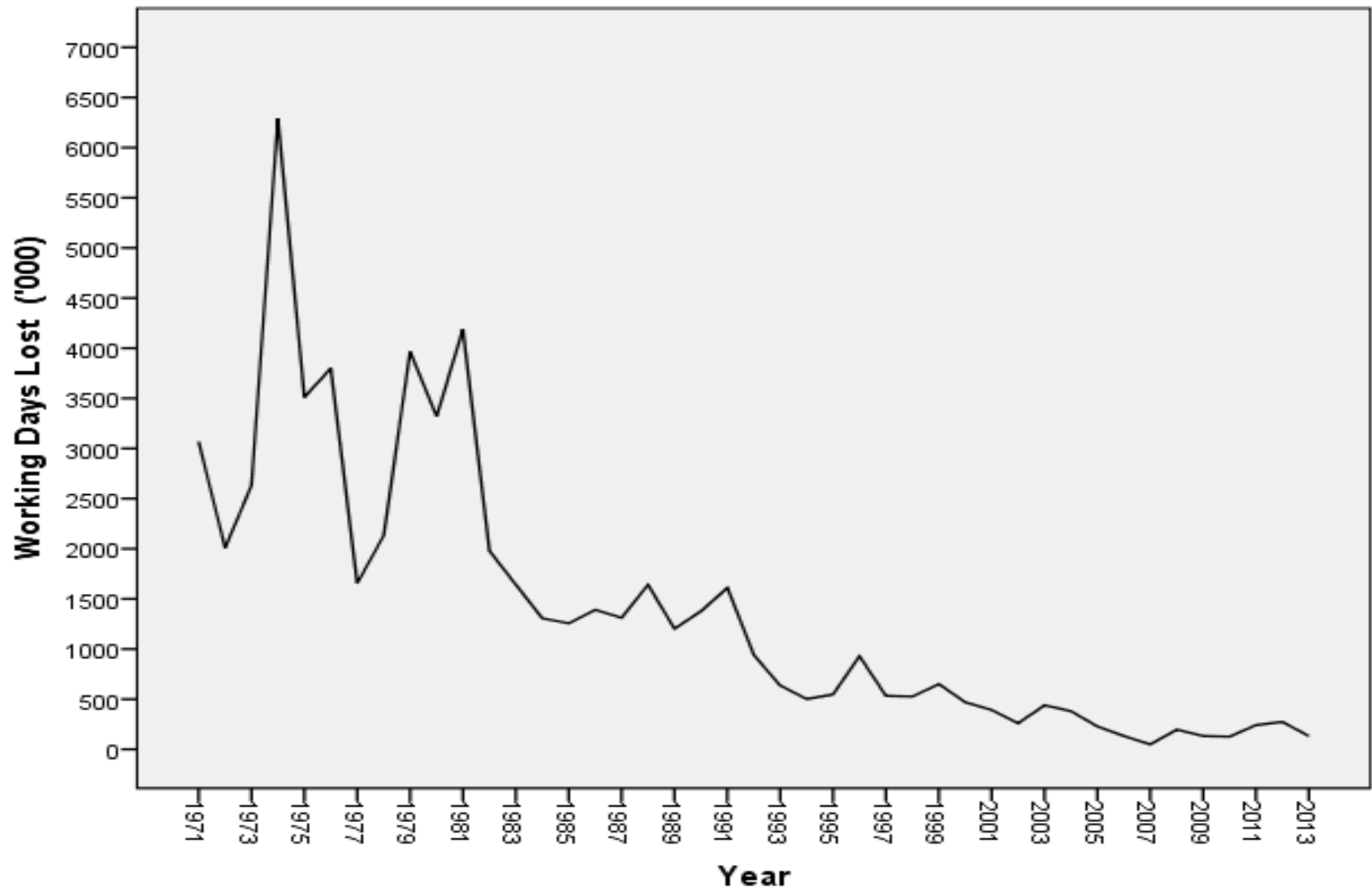
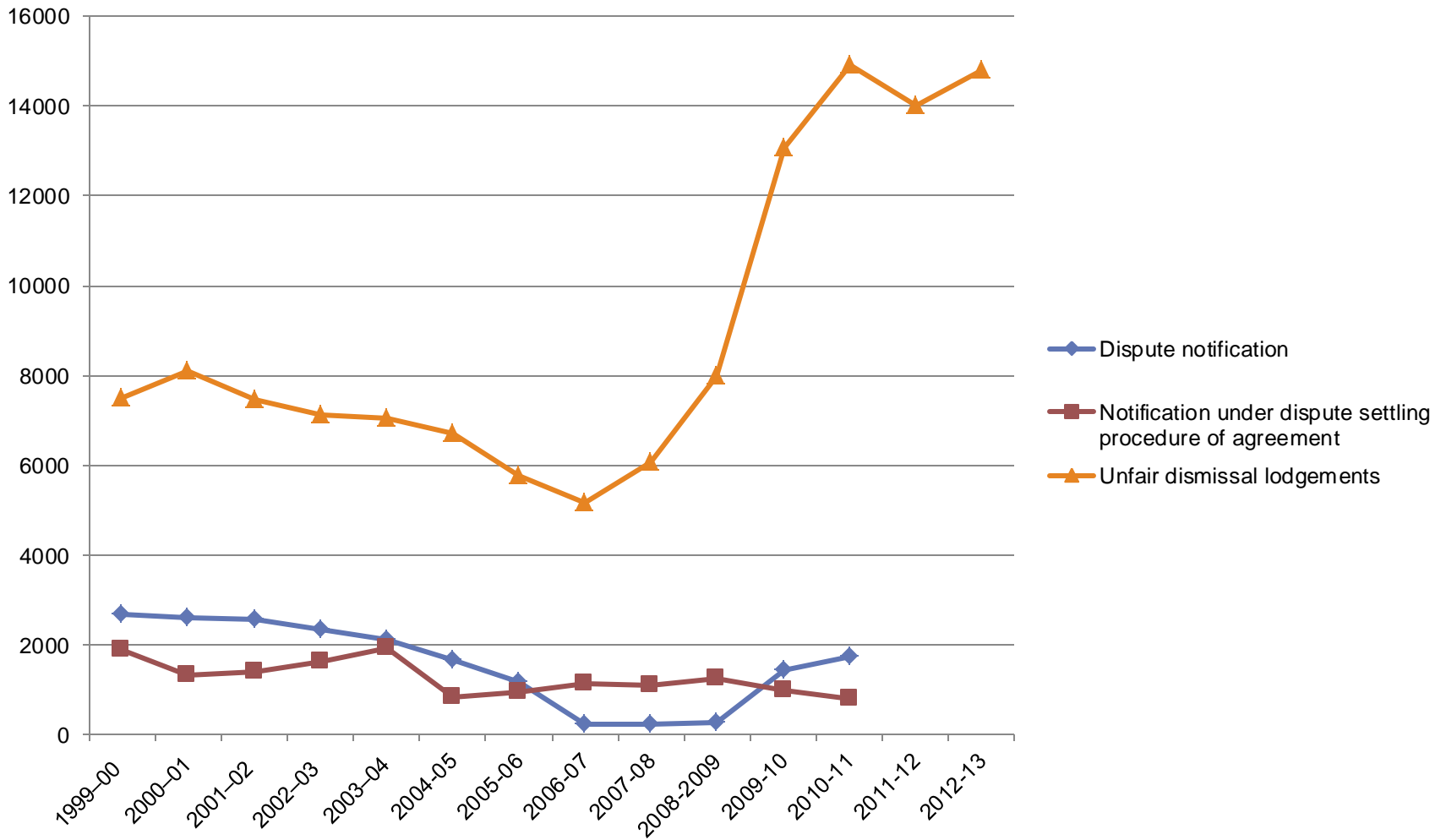# Declining collective action: international
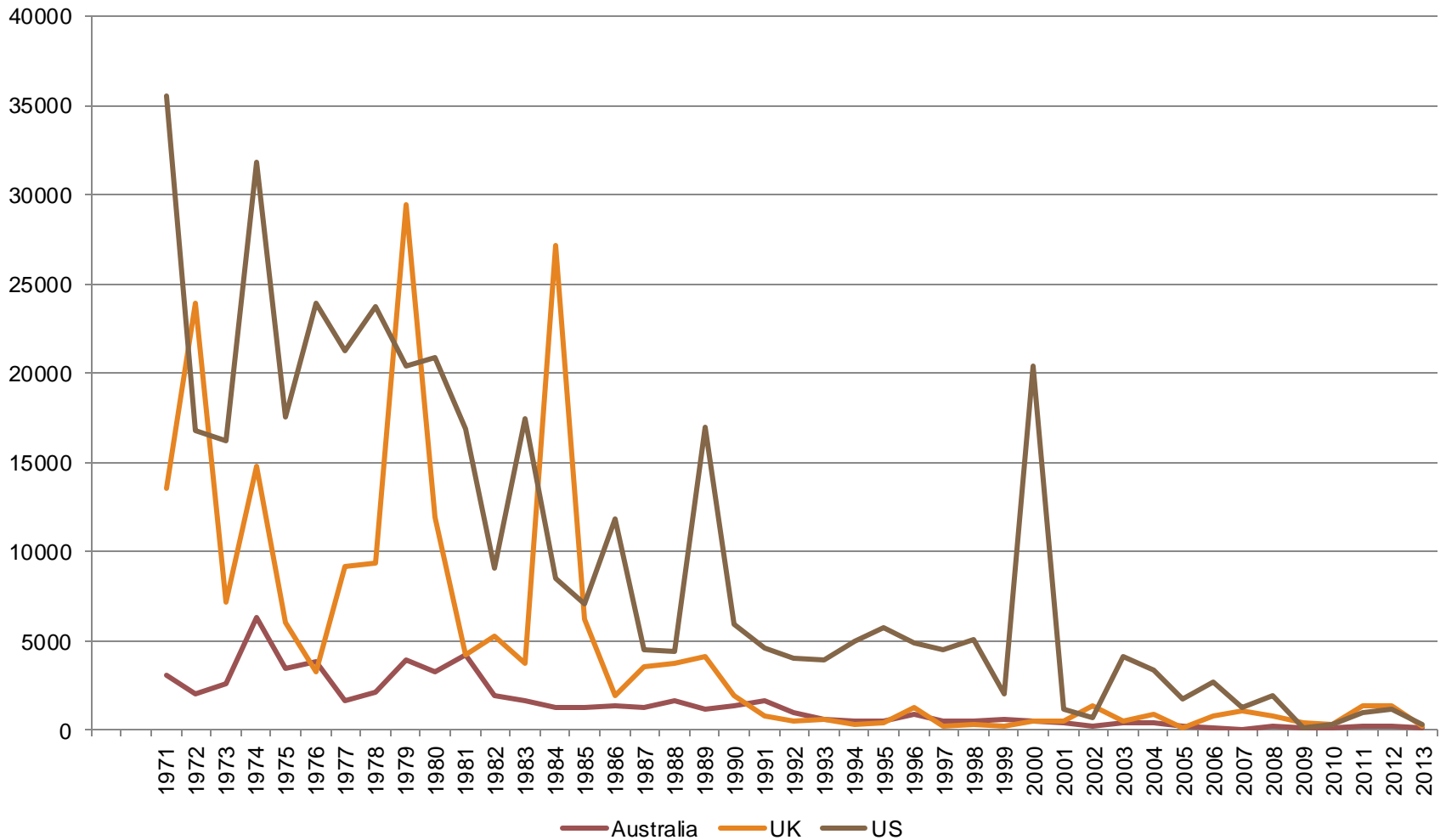
Declining trade union membership: international

Trade Union Density Trend: 1983-2010

Increasing incidence of individual disputes: Australia

The prevalence of formal procedures

- 84% indicated their organisation had formal procedures in place for dealing with individual disputes, and the proportion is strongly associated with organisational size.
  - This is similar to WERS (2011) which found that 89% of workplaces have formal procedures.
- Of the formal procedures used to resolve individual disputes, the HR policy manual or guidelines was the most commonly used procedure/policy – again increasing as expected with organisational size.
- 82% of organisations experienced individual disputes in the last 12 months
  - ranging from just over a third of organisations with <20 employees and nearly all organisations with >500 employees.

The causes of individual disputes

- Regardless of organisational size, the most common disputes were related to personality and disciplinary matters, followed by employment conditions and bullying.

- In smaller organisations, disputes over employment conditions were common as were personality and disciplinary matters.

- Each type of dispute is less likely to be reported in smaller organisations, or, more interestingly, there are more of every type of dispute as organisation size increases,
    - What we will never know is whether this would have held true in the past when union density was much higher.
    - But wages and employment issues become more important in micro-firms.

How much time spent on individual disputes?

< 20 employees   4   hours per week
20-99   8   hours
100-499   11 hours
500 or more   14 hours per work

- So in absolute terms larger firms have a higher frequency of all dispute types and spend more hours resolving them.

Most commonly used methods of DR
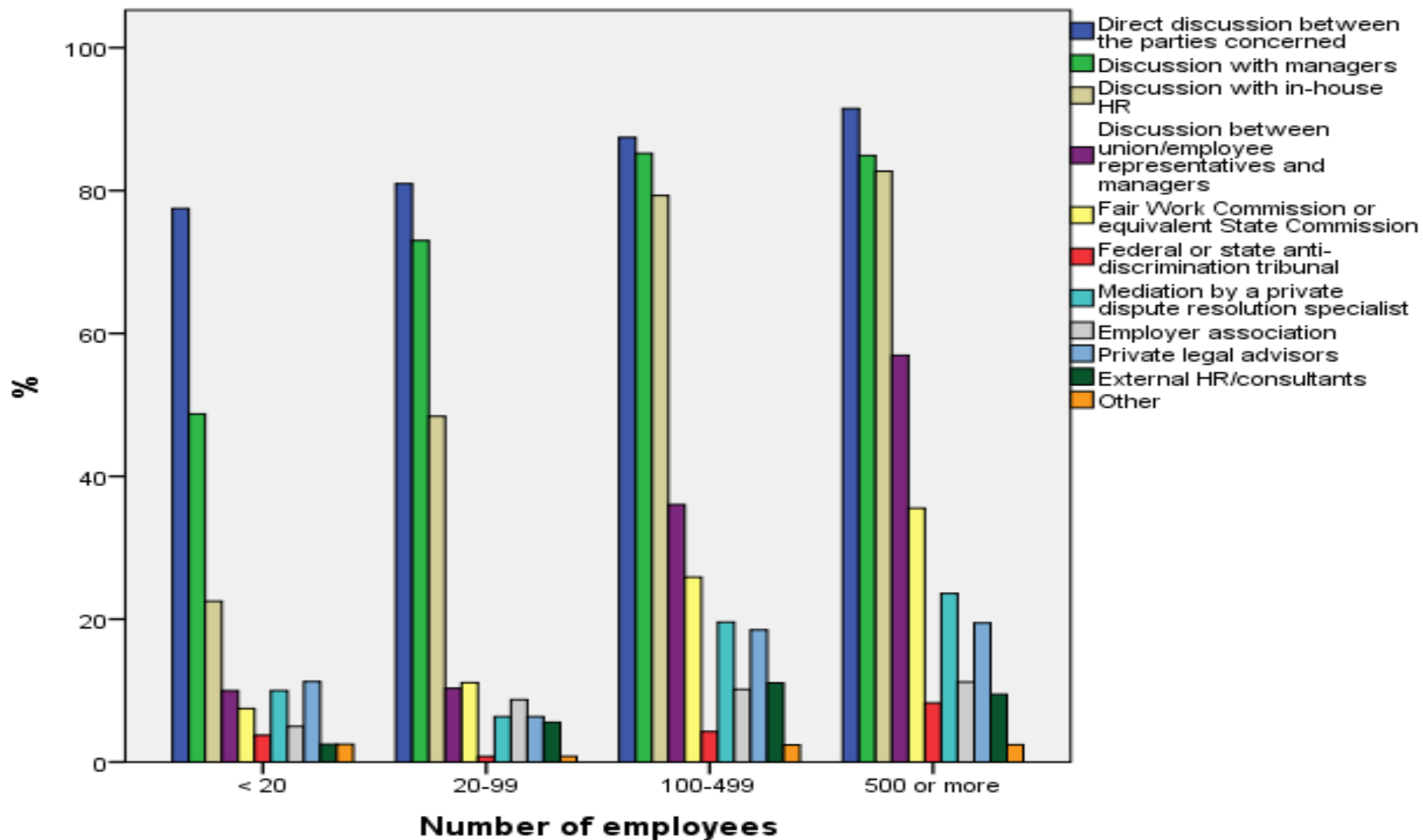
The prevalence of workplace settlement is unsurprising

- At all sizes, the most commonly used methods used to resolve disputes were direct discussion between the parties concerned, followed by discussion with line managers and then HR managers
- As might be expected unions and then tribunals came next
  - This is consistent across all sizes
- Organisations utilise external resources such as employer associations and legal advisers less commonly
  - Private mediation in its various forms is still a marginal player

Locus of dispute resolution: perceived effectiveness

- The perceived most effective method of DR for all sizes was direct discussion followed by use of HR managers
- In larger organisations the perceived effectiveness of HR managers is greater but this may be an artefact of 'presence'.
- Discussion with line managers did not appear as a preferred option for any size range (around 5%)
- Unions and other external mechanisms and third parties such as the FWC were still lower, perhaps surprisingly.
  - Within the Australian culture, tribunals are invoked typically as a last resort; for problem cases
  - There are similarities in the role of the Fair Work Commission in Australia ---and ACAS but the latter is not embedded in the legal framework in the same way

Findings from the interviews:
(1) Individuals raising disputes

- In the view of tribunal members, individuals raising disputes at work face a number of hurdles:

- While individuals tend to know their rights, when raising a dispute they generally do not understand the dispute process or how to frame their concern:

  - *'When I say to employees, you had other options. You could've used the dispute resolution procedure in the award. They look at me as though I'm talking gobble-de-gook'.*

  - *'Now that there's a lower rate of union density and individuals are on their own, they're not as able to deal with these matters directly with their employers. Or they're too scared to deal with them directly with their employers'.*

Individuals raising disputes

- A major cause of individual disputes is over the level of surveillance at work:
  - *'I'm just saying the level of pressure and surveillance in many areas of work - I think that's a significant cause in the growth of individual grievances and problems'.*
  - *'So a particular worker gets disciplined for taking toilet breaks. Well what the real dispute there is about, is about the excessive control of people's working time, or excessive surveillance'.*
- But there is a much greater disposition to engage in conflict; there is a sense of entitlement:
  - *"I think people are more inclined to take individual disputes these days, probably just a factor of society and Gen Y, Gen X. Gen Y people particularly are much more inclined to see things as a rights based issue instead of an interest based issue" (Asbury).*

(2) HR Managers and individual disputes

- There is a general reluctance of HR managers to deal with disputes in a systemic or collective way. Instead, individual disputes are handled as if they do not affect other employees in the same position:

  - *'If one person wants to claim something, they'll deal with it as one person making a claim and they won't view it collectively and they're reluctant to do that'*

- HR managers can be reluctant do look into a dispute unless it is submitted formally in writing:

  - *'So we've put up a lot of barriers to people the way in which they're able to raise issues in the workplace. It has to be in writing, it has to be in accordance with this procedure, you have to get this right, you have to get that right: otherwise it's ignored. That in itself is a cause for frustration in the workplace'.*

HR Managers and individual disputes

- HR manager neutrality is problematic in a conflict resolution scenario:
  - *'The HR manager is - I think one of the problems and one of the reasons why employees do get damaged by a lot of this process is that they think they're on their side. At best they're neutral and at worst they're looking after the interests of the employer'.*
- Training in conflict management is not prevalent and this is a contributing factor to the inability for some organisations to settle disputes at workplace level:
  - *'Certainly in my time as acting for large employers the training of managers in conflict resolution is not something that seems to be a high priority for organisations'.*

(3) The tribunal and individual disputes

- The rise of the unrepresented litigant places pressures not only on the complainant but on the Commission itself:
  - *'You've got the unrepresented conundrum. You know? How you're going to do it? Are you going to do in a formal hearing? Are you going to do it in a conference? Are you going to do it in - you know, our role has to change, especially if they're unrepresented"*

- Providing easier documentation for individuals to lodge their cases:
  - *'Having the written material in standard form so you can do it virtually multiple choice, questionnaires online. Tick the box thing. So making it - making our procedures easier for the unrepresented litigants'*

The tribunal and individual disputes

- Providing advice on individual cases is another adaptation by the members of the Commission to assist individuals:

    - *'we assess people's cases and we say if this went to a hearing, when we conciliate, this is probably what would happen. On your own material, here's your problem. We do that evenly, I think, both ways, and people settle matters and then turn around and complain. I've never seen anyone with a perfect case settle'.*

    - *'we have a responsibility to try and assist unrepresented parties. We can't be their representative. So I think it's a real - but the dilemma is, on the other side of the dilemma is you're represented and you pay out a large amount of money to be represented in a jurisdiction where the remedies are not very large'.*

Concluding thoughts

- We have a working hypothesis that the process of individualisation of employment relations is widespread, though the evidence is incomplete.

- In Anglo-American nations this is manifest in the increasing role (not influence of HR); perhaps something similar but attenuated is occurring in parts of Europe?

- The performance of management in dealing with disputes and giving employees voice is variable across organisations.

- The Australian experience of a heavy reliance on state regulation of DR may be instructive as it evolves to an individual rights based jurisdiction.

- In the UK and Australia we find increasing evidence of a rise of individual disputes coming before various tribunals.