PROTECTIONS IN RELATION TO DISMISSAL: FROM THE WORKPLACE RELATIONS ACT TO THE *FAIR WORK ACT*

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I INTRODUCTION

Over the past 15 years the statutory framework regulating fairness in dismissal has undergone much change, as parliaments have attempted to address what they see as the inadequacies of the system. This paper provides a comparison of three time periods at the federal level: the *Workplace Relations Act 1996* (Cth) ('*WR Act*') before the Work Choices package of late 2005,[1] the *WR Act* after the Work Choices package took effect, and the Rudd Government's new *Fair Work Act 2009* (Cth) ('*FW Act*'), which passed both House of Parliament on 20 March 2009. Most of the termination of employment provisions in the *FW Act* commenced on 1 July 2009, with the remainder (namely those in the National Employment Standards) expected to commence on 1 January 2010.

The objective of this article is to provide an overview of the continuities and discontinuities over these three periods, with a focus on the framework of the new *FW Act*. The paper examines both unfair dismissal law and unlawful termination law, as they have generally become known. Unfair dismissal law provides an avenue for certain employees to make an application for relief on the ground that their termination was 'harsh, unjust or unreasonable'. Unlawful termination, by contrast, has come to refer to a package of additional provisions regarding termination of employment, namely, minimum notice periods, a prohibition on dismissal based on a discriminatory ground such as race or sex, and information and consultation requirements on employers relating to redundancies of 15 or more employees.[2]

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1 The Work Choices package was the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), which took effect from 27 March 2006.

2 Notably the *FW Act* uses the language of unlawful termination in a more limited sense. See, eg, ss 723, 730, 731, 778(2).

The article commences by profiling the changes in unlawful termination law. Following that it turns to unfair dismissal law.

II UNLAWFUL TERMINATION

The following table highlights the main features of federal legislation regarding unlawful termination in the three time periods under study. The first column – the *WR Act* before Work Choices – presents the federal legislative provisions as amended by the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth). This 1996 Act amended the *Industrial Relations Act 1988* (Cth), and renamed it the *WR Act*. The second column – the *WR Act* after Work Choices – presents a summary of the provisions in the *WR Act* as amended by the Work Choices package, and the third column presents the *FW Act* as enacted in March 2009.

***WR Act* before Work Choices**	***WR Act* after Work Choices**	***FW Act 2009***
Must have been 'a termination of employment at the initiative of the employer'.[3]	Unaltered apart from attempted clarification in relation to forced resignations.[4]	Concepts used are 'terminate', 'terminated', 'dismisses' and 'dismiss'.[5]
Employer to provide notice of termination in accordance with a sliding scale of minimum notice periods.[6]	Unaltered.[7]	Unaltered apart from a requirement that the employer must provide the notice in writing.[8]
Employer prohibited from termination on a range of grounds, including temporary absence from work, trade union activities, participation in legal proceedings against the	Unaltered.[10]	For 'national system employees' – transformed into a new 'adverse action' claim that covers all aspects of employment.[11] Addition of new ground of

3 *WR Act* s 170CD(1).

4 *WR Act* s 642.

5 *FW Act* ss 117, 119, 342, 530, 531. These concepts are not defined in the *FW Act*, although s 119 on severance pay requires that the employment be terminated at the employer's initiative. The s 386 definition of 'dismissed' relevant to unfair dismissal (noted below) is likely to be instructive of the meaning of these unlawful termination concepts.

6 *WR Act* s 170CM. Minimum notice periods were first recognised in the award system in 1984, and later in federal legislation in 1993: *Termination, Change and Redundancy Case* (1984) 8 IR 34; *Termination, Change and Redundancy Case – Supplementary Decision* (1984) 9 IR 115; *Industrial Relations Reform Act 1993* (Cth) which amended the *Industrial Relations Act 1988* (Cth).

7 *WR Act* s 661.

8 *FW Act* s 117.

employer, and discriminatory grounds including race, sex, and pregnancy. These latter discriminatory grounds were subject to exemptions of 'inherent requirements' and religious institutions.[9]		'carer's responsibilities'.[12] For non-'national system employees' – unaltered save for addition of new ground of 'carer's responsibilities'.[13]
Employer prohibited from termination on grounds related to freedom of association.[14]	Unaltered.[15]	Transformed into a new 'adverse action' claim.[16]
Employer to provide information and consultation in relation to larger redundancies (15 or more employees). Enforced through a range of possible orders.[17]	Narrowed – AIRC orders must not include reinstatement, payment in lieu of reinstatement, withdrawal of notice if the notice period has not expired, severance pay.[18]	Unaltered.[19]
		Employer to provide redundancy pay in accordance with a sliding scale, in relation to employees with at least 12 months service.[20] Exemption of 'small business employer'.[21]

9 *WR Act* ss 170CK, 170CQ.
10 *WR Act* ss 659, 664.
11 *FW Act* ss 342, 351 on the meaning of 'adverse action'. See also s 12 definition of 'adverse action'.
12 *FW Act* s 351(1).
13 *FW Act* s 772.
14 *WR Act* ss 298K(1)(a), 298L.
15 *WR Act* ss 792(1)(a), 793.
16 *FW Act* ss 342, 346 on the meaning of 'adverse action'.
17 *WR Act* ss 170CL, 170GA–170GD, 170CN, 170FA. These obligations on employers have also existed in the award system since 1984, and in federal legislation since 1993: *Termination, Change and Redundancy Case* (1984) 8 IR 34; *Termination, Change and Redundancy Case – Supplementary Decision* (1984) 9 IR 115; *Industrial Relations Reform Act 1993* (Cth) which amended the *Industrial Relations Act 1988* (Cth).
18 *WR Act* ss 660, 668.
19 *FW Act* ss 530–532. See also ss 784–789.
20 *FW Act* s 119.
21 *FW Act* s 121(1)(b).

A Unlawful Termination and the *WR Act*

The post-Work Choices provisions on unlawful termination were for the most part not significantly different to the pre-Work Choices framework. Parliament decided in its 2005 Work Choices package to largely leave the unlawful termination framework alone, apart from two matters: attempting to clarify the concept of 'termination of employment at the initiative of the employer' and secondly narrowing the protections in relation to larger scale redundancies.[22]

Prior to 2005 uncertainty had arisen as to whether an apparent resignation by an employee could constitute a termination 'at the initiative of the employer', in circumstances where the employee has terminated in response to breaches of contract by his or her employer. In *O'Meara v Stanley Works Pty Ltd*, a Full Bench of the Australian Industrial Relations Commission ('AIRC') reviewed the decisions on the meaning of termination of employment 'at the initiative of the employer' (under the *WR Act* before Work Choices), and concluded that what was required was:

> some action on the part of the employer which is either intended to bring the employment to an end or has the probable result of bringing the employment relationship to an end. It is not simply a question of whether 'the act of the employer [resulted] directly or consequentially in the termination of the employment.' … In determining whether a termination was at the initiative of the employer an objective analysis of the employer's conduct is required to determine whether it was of such a nature that resignation was the probable result or that the appellant had no effective or real choice but to resign.[23]

The Work Choices package enacted a new statutory test on this matter:

> the resignation of an employee is taken to constitute the termination of the employment of that employee at the initiative of the employer if the employee can prove, on the balance of probabilities, that the employee did not resign voluntarily but was forced to do so because of conduct, or a course of conduct, engaged in by the employer.[24]

Although commentators have construed the Work Choices amendment as being narrower on its face than the pre-Work Choices approach,[25] the AIRC's interpretation of the amended legislation has downplayed any difference between the pre-Work Choices position and the post-Work Choices rule.[26] The Work Choices package made important changes to the redundancy provisions in the

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22 On the *WR Act* before Work Choices, see generally: Anna Chapman, 'Termination of Employment under the Workplace Relations Act 1996 (Cth)' (1997) 10 *Australian Journal of Labour Law* 89. On the *WR Act* after Work Choices, see generally: Anna Chapman, 'Unfair Dismissal Law and Work Choices: From Safety Net Standard to Legal Privilege' (2006) 16 *Economic and Labour Relations Review* 237; Marilyn Pittard, 'Back to the Future: Unjust Termination of Employment under the Work Choices Legislation' (2006) 19 *Australian Journal of Labour Law* 225.

23 [2006] AIRC 496 ('*O'Meara*'), [23] (emphasis and citations omitted). *O'Meara* was applied in the Full Bench decision of *Visscher v Teekay Shipping (Australia) Pty Ltd* [2006] AIRC 63.

24 *WR Act* s 642(4).

25 Andrew Stewart, *Stewart's Guide to Employment Law* (2008) [17.15]; Rosemary Owens and Joellen Riley, *The Law of Work* (2007) 420.

26 Anna Chapman, 'The Decline and Restoration of Unfair Dismissal Rights' in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (2009) 207, 219–20.

WR Act. Some provisions were deleted, whilst others were weakened. Before Work Choices the *WR Act* provided a set of protections regarding terminations of 15 or more employees for reasons of an 'economic, technological, structural or similar nature'. In such situations employers were required to provide notice to a government agency of the proposed terminations, and to inform and consult with relevant trade unions. A range of remedies were potentially available, including injunctions to prevent the terminations of employment from taking place, reinstatement orders and orders for severance payments.[27] Work Choices narrowed those provisions in important respects. The AIRC was issued with a clear directive that any order it makes must not include an order for reinstatement of an employee, payment in lieu of reinstatement, withdrawal of a notice of termination if the notice period had not expired, and severance pay.[28] This amounted to a significant weakening of the redundancy rights in the *WR Act*.

B Unlawful Termination and the *FW Act*

The main unlawful termination (and unfair dismissal) protections in the *FW Act* are contained in three different places: the new National Employment Standards (Part 2-2), the General Protections (Part 3-1); and 'Other Rights and Responsibilities' (Part 3-6). These provisions use the key concepts of 'national system employee' and 'national system employer'. A 'national system employee' is defined in section 13 of the Act as an employee in the common law sense who is employed by a 'national system employer'. A 'national system employer' is then defined in section 14 by reference to the constitutional bases of the provisions, namely, constitutional corporations; the Commonwealth; Commonwealth authorities; persons who, in connection with constitutional trade and commerce, employ flight crew officers, maritime employees and waterside workers; and an employer in a Territory. This list of employers is the same as the coverage of the *WR Act* (pre- and post-Work Choices).[29] Unlike the *WR Act* though, at the time of writing the *FW Act* does not contain special provisions to provide additional coverage in Victoria.[30]

In addition to these provisions for 'national system' employees and employers, the Act contains extension provisions that apply in relation to non-'national system employees'. The 'national system' provisions are examined first. Following that the extension provisions are described.

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27 *WR Act* ss 170CL, 170GA–170GD, 170CN, 170FA.

28 *WR Act* ss 660, 668. See generally Chapman, 'Unfair Dismissal Law and Work Choices', above n 22.

29 See: Andrew Stewart, 'A Question of Balance: Labor's New Vision of Workplace Regulation' (2009) 22 *Australian Journal of Labour Law* 3, 12–13, 39; Andrew Stewart, 'Testing the Boundaries: Towards a National System of Labour Regulation' in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (2009) 19.

30 The Fair Work (State Referral and Consequential and Other Amendments) Regulations 2009 commenced on 1 July 2009. These regulations enable State parliaments to refer power over industrial relations to the Commonwealth. At the time of writing several States have indicated their preparedness to refer power, including Victoria, Tasmania, Queensland, and South Australia: 'Queensland the latest to back national IR system, as Victoria and Canberra sign new deal', *Workplace Express* (Sydney), 11 June 2009 <http://www.workplacexpress.com.au> at 3 September 2009.

1 *Protection in Relation to National System Employees*

(a) Minimum Notice Periods to be Provided by Employer

Part 2-2 Division 11 of the *FW Act* provides minimum standards of notice. The minimum notice period provisions require that employers must not terminate an employee's employment unless the employee has been given written notice of the day of the termination.[31] Notice is not required however where the employment was terminated for 'serious misconduct'.[32] The *FW Act* contains a new requirement that the notice be in writing. The specified minimum period of notice, or payment in lieu of notice, depends on, and increases with, the employee's length of continuous service – starting at one week's notice for not more than one year's service, and rising to four weeks' notice for more than five years' service.[33] Where the employee is over 45 years of age and has completed at least two years' continuous service with the employer, the notice period is increased by one week.[34]

(b) Adverse Action Claims

Several sets of provisions of the *WR Act*, including the discriminatory dismissal and freedom of association protections, have been reconceptualised in the *FW Act* and subsumed under the broader 'adverse action' provisions in Part 3-1 Division 5. The Act provides a remedy where an employer takes 'adverse action' against an employee (including dismissing the employee) 'because of the person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.'[35] In addition, an employer must not dismiss an employee because the employee is temporarily absent from work because of illness or injury of a kind prescribed by the regulations.[36] This list of grounds is the same as that which existed under the *WR Act* (before and after Work Choices), save for the addition of 'carer's responsibilities'.[37] A remedy is also provided where an employer takes 'adverse action' against an employee because of that person's trade union membership or industrial activity.[38]

In relation to the first group of grounds (in section 351), a remedy does not apply in relation to employer action that is not unlawful under applicable anti-discrimination law, or is taken because of the 'inherent requirements of the particular position concerned', or where the action is taken in good faith against a

31 *FW Act* s 117(1).

32 *FW Act* s 123(1)(b). Section 12 indicates that the concept of 'serious misconduct' is defined in the *Fair Work Regulations 2009* (Cth). See reg 1.07.

33 *FW Act* s 117(2), (3).

34 *FW Act* s 117(3)(b).

35 *FW Act* s 351(1). The concept of 'adverse action' is articulated in s 342. See also s 12 definition of 'adverse action'.

36 *FW Act* s 352. See *Fair Work Regulations 2009* (Cth) reg 3.01.

37 *WR Act* s 659(2)(f). This list, and most of its items, can be sourced back to the *Termination, Change and Redundancy Case* (1984) 8 IR 34; *Termination, Change and Redundancy Case – Supplementary Decision* (1984) 9 IR 115, and the Industrial Relations Reform Act 1993 (Cth).

38 *FW Act* s 346.

staff member of a religious institution in order 'to avoid injury to the religious susceptibilities of adherents of that religion or creed.'[39] The reference to the need for the conduct to be unlawful under applicable anti-discrimination law is a new feature within the *FW Act* and did not exist in the *WR Act* (before and after Work Choices). The 'inherent requirements' exemption and the exemption in relation to religious institutions did exist in the *WR Act* (both pre- and post- Work Choices).[40]

Like the *WR Act* framework (pre- and post-Work Choices) the discriminatory ground need only be one reason for the action,[41] and a reverse onus of proof applies.[42] There is no cap on compensation in relation to these provisions, as there was previously under the *WR Act* (pre- and post-Work Choices). For this reason in particular this new 'adverse action' claim in relation to discriminatory grounds may provide a more attractive alternative than a complaint under anti-discrimination law.

(c) Employer Obligations of Information and Consultation with Trade Unions

Part 3-6 Division 2 of the *FW Act* imposes a requirement on an employer who proposes to terminate the employment of 15 or more employees for reasons of an 'economic, technological, structural or similar nature' to provide written notice of the proposed dismissals to Centrelink.[43] Such employers are also required to provide trade unions with notice of the proposed terminations and an opportunity to consult.[44] Like the *WR Act* provisions (after Work Choices) it is not possible to obtain an order for reinstatement of an employee, payment in lieu of reinstatement, withdrawal of a notice of termination if the notice period has not expired, or payment of severance pay.[45]

(d) Redundancy Pay

Under the *WR Act* regime (both before Work Choices and after Work Choices) redundancy pay was a matter for the award system. Work Choices introduced important changes to that award framework. Existing award provisions for redundancy pay were permitted to continue, although they could generally only apply in relation to employers with 15 or more employees.[46] In addition, after Work Choices award provisions on redundancy pay could be

39 *FW Act* s 351(2). Note 'anti-discrimination law' is defined in an unsurprising way. It includes the full range of federal statutes such as the *Racial Discrimination Act 1975* (Cth), *Sex Discrimination Act 1984* (Cth) and *Disability Discrimination Act 1992* (Cth). And it includes State and Territory legislation such as the *Equal Opportunity Act 1995* (Vic) and the *Anti-Discrimination Act 1977* (NSW).

40 These exemptions of 'inherent requirements' and religious institutions have their origins in the *Termination, Change and Redundancy Case* (1984) 8 IR 34; *Termination, Change and Redundancy Case – Supplementary Decision* (1984) 9 IR 115, and the *Industrial Relations Reform Act 1993* (Cth).

41 *FW Act* s 360.

42 *FW Act* s 361.

43 *FW Act* s 530. See also s 534.

44 *FW Act* s 531.

45 *FW Act* s 532.

46 *WR Act* s 513(1)(k), (4).

bargained away through a workplace agreement.[47] This meant the loss of redundancy pay entitlements for many employees.

The new National Employment Standards in the *FW Act* provide a statutory standard of redundancy pay for 'national system employees' (Part 2-2 Division 11). The legislative standard though does not apply where the employer is a 'small business employer' or the employee has had less than 12 months of continuous service.[48] The concept of redundancy used in these provisions is where the employer has terminated because it 'no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour', or because of the insolvency or bankruptcy of the employer.[49] This definition is similar to the definition of 'genuine redundancy' used as an exemption to unfair dismissal law under the *FW Act*, discussed further below.

Redundancy pay is calculated according to length of continuous service with the employer, and starts at four weeks pay for at least one year but less than two years service, and rises to a maximum of 16 weeks pay for between nine and 10 years service.[50] These are the same amounts as formulated in a 2004 AIRC test case on award provisions.[51] Where an employer 'cannot pay the amount' owing to an employee, Fair Work Australia ('FWA') has the ability to reduce the amount of redundancy pay payable, potentially to nil.[52] There are in addition provisions relating to transfer of business, and where an employee rejects an offer of alternative comparable employment.[53]

2 *Protection in Relation to Non-National System Employees*

Chapter 6 of the Act (headed 'Miscellaneous') contains important extension provisions relating to dismissal. Parts 6-3 (Division 3) and 6-4 provide minimum notice periods, redundancy pay, a prohibition on discriminatory dismissal and also notification and consultation requirements in relation to larger-scale redundancies. The Chapter 6 rules are substantively similar to the dismissal provisions contained in Part 2-2, Part 3-1, and Part 3-6 (discussed above), apart from notably that the provisions on termination of employment for a discriminatory ground have not been transformed into an 'adverse action' claim.

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47 Owens and Riley, above n 25, 437–9.

48 *FW Act* s 121(1). Modern awards may also specify other exclusions, and such provisions may be incorporated into enterprise agreements: s 121(2), (3). The definition of 'small business employer' (s 23) for this provision is not altered by the agreement struck between Senator Steve Fielding and the government on the amended meaning of a 'small business employer': Stewart, 'A Question of Balance', above n 29, 37; *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth).

49 *FW Act* s 119(1).

50 *FW Act* s 119(2).

51 *Redundancy Case* (2004) 129 IR 155, 198. This 2004 test case extended the original test case scale (which went up to eight weeks' pay for more than four years service) set in *Termination, Change and Redundancy Case – Supplementary Decision* (1984) 9 IR 115, 131.

52 *FW Act* s 120.

53 *FW Act* s 122.

They remain as they were under the *WR Act* (both pre- and post- Work Choices) save for the addition of a new ground of 'carer's responsibilities'.[54]

These provisions are intended to give effect to Australia's international obligations in relation to these matters,[55] and the external affairs head of power in section 51(xxix) of the *Australian Constitution* has been used to enact them. On their face they apply to all employees, in the common law sense.[56] The potential overlap between these provisions in Chapter 6, and Parts 2-2, 3-1 and 3-6 is managed primarily through section 723, which provides that a person 'must not make an unlawful termination application in relation to conduct if the person is entitled to make a general protections court application in relation to the conduct.' The result is that Parts 2-2, 3-1 and 3-6 apply generally in relation to 'national system employees' and the Chapter 6 framework is relevant in relation to non-'national system employees', or generally where alternative action cannot be taken.

III UNFAIR DISMISSAL

The following table identifies the main features of federal legislation regarding unfair dismissal in the three periods of time. The first column – the *WR Act* before Work Choices – presents the federal legislative provisions as amended by the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth). The second column – the *WR Act* after Work Choices – presents a summary of the provisions in the *WR Act* on unfair dismissal as amended by the 2005 Work Choices package, and the third column presents the *FW Act* as enacted in March 2009.

***WR Act* before Work Choices**	***WR Act* after Work Choices**	***FW Act***
Must have been 'a termination of employment at the initiative of the employer'.[57]	Unaltered apart from attempted clarification in relation to forced resignations.[58]	Employee must have been 'dismissed' – substantively the same as previous *WR Act* test.[59]
Test is whether the termination was 'harsh, unjust or unreasonable'.[60]	Unaltered.[61]	Unaltered.[62]

54 *FW Act* s 772(1)(f).
55 *FW Act* ss 758, 771, 784.
56 *FW Act* ss 720, 742, 770. See also s 15 for the ordinary meanings of 'employee' and 'employer'.
57 *WR Act* s 170CD(1).
58 *WR Act* s 642. See discussion above in relation to unlawful termination.
59 *FW Act* s 386.
60 *WR Act* s 170CE(1)(a).
61 *WR Act* s 643(1)(a).
62 *FW Act* s 385 (b).

Overriding objective is to ensure a 'fair go all round' is accorded to both the employer and employee.[63]	Unaltered.[64]	Unaltered.[65]
List of factors that must be taken into account: whether there was a valid reason related to capacity, conduct or operational requirements; whether employee was notified of that reason; whether employee was given an opportunity to respond to capacity or conduct reasons; whether employee had been warned of performance issues; any other relevant matter.[66]	Altered to delete reference to valid reason related to 'operational requirements' of the undertaking, and to add reference in valid reason to include the safety and welfare of other employees.[67]	Altered to add a new factor: 'any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal'.[68]
Exclusions from coverage: employees on fixed term or fixed task contracts; employees serving a period of probation; short term casuals; some trainees; some employees in the building, maritime and meat industries; non-award high income earners.[69]	Altered to add new exclusions from coverage: where the termination was for 'genuine operational reasons'; where the employer employed 100 employees or fewer; where the employee was serving the six months qualifying period; seasonal employees.[70]	Considerable change in relation to exclusions from coverage, so that the exclusions are now: compliance by a 'small business employer' with the Small Business Fair Dismissal Code; 'genuine redundancy'; 'minimum employment period'; non-award high income earners.[71]

63 *WR Act* s 170CA(2).
64 *WR Act* s 635(2).
65 *FW Act* s 381(2). Like the *WR Act* (pre- and post-Work Choices), this phrase is explicitly referenced to *Re Loty and Holloway v Australian Workers' Union* [1971] AR (NSW) 95, a decision in the NSW award jurisdiction.
66 *WR Act* s 170CG(3). Two further factors were added in 2001 in an attempt to address the needs of small business: the degree to which the size of the employer's undertaking, and the absence of dedicated human resource management specialists, would be likely to impact on the procedures followed by the employer: *Workplace Relations Amendment (Termination of Employment) Act 2001* (Cth).
67 *WR Act* s 652(3). The two additional factors added in 2001 – see above n 66 – were also reproduced in the Work Choices changes.
68 *FW Act* s 387.
69 *WR Act* s 170CC. In 2001 a three month default qualifying period was added.
70 *WR Act* ss 638, 643.
71 *FW Act* ss 385(c), 388, 385(d), 389, 382(a), 383, 384(2)(b). On the high income threshold, see *Fair Work Regulations 2009* (Cth) reg 3.05.

A Unfair Dismissal and the *WR Act*

Contraction was the main theme that characterised the changes brought to the *WR Act* jurisdiction by Work Choices. Commentators wrote that the federal unfair dismissal scheme was 'eroded' under Work Choices.[72] I described in an earlier paper how Work Choices had transformed the protection against unfair dismissal into a 'legal privilege', in the sense of being an exclusive right enjoyed only by some employees in certain closely defined circumstances. In other words, unfair dismissal protection could no longer be described as a minimum employment standard of general application.[73]

The contraction of the jurisdiction with Work Choices was reflected in a decline in the number of complaints. There was a decrease of 18.5 per cent in applications of unfair dismissal and unlawful termination under the federal provisions in the first 12 months of Work Choices (27 March 2006 – 26 March 2007).[74] In Victoria, where the Victorian private sector had been under the federal scheme since 1997, employees lodged 1 994 applications in the first year of Work Choices, compared to 3 688 in the previous year.[75] Elsewhere, Work Choices displaced active State unfair dismissal jurisdictions. For example, in New South Wales in the four years leading up to Work Choices, 3 500–4 500 applications of unfair dismissal were lodged each year with the State Commission, compared to around 1 500 applications in the 2006 calendar year.[76]

A main way in which Work Choices reduced the coverage of unfair dismissal law was through introducing a set of new exemptions. These were perhaps the most contentious aspect of the Work Choices package, and took effect to exclude large numbers of employees from protection in relation to unfair dismissal. If one of these exemptions applied, the application ceased at that point and the AIRC had no jurisdiction to examine the fairness of the dismissal. The three main Work Choices exemptions are examined in turn: 'genuine operational reasons', the 100 employee exemption, and the qualifying period requirement.[77]

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72 Joydeep Hor and Louise Keats, *Managing Termination of Employment: A Best Practice Guide Under Work Choices* (2007) 5.

73 Chapman, 'Unfair Dismissal Law and Work Choices', above n 22, 237.

74 Justice Geoffrey Michael Giudice, 'Opening Address' (Speech delivered at the Industrial Relations Society of Australia National Conference, Canberra, 30 March 2007), <http://www.fwa.gov.au/about/speeches/giudicej300307.htm> at 3 September 2009. These figures were not disaggregated to show the number of applications that alleged unfair dismissal, unlawful termination, or both.

75 Ibid.

76 Industrial Relations Commission of New South Wales, *Annual Report: Year Ended 31 December 2006* (2007) 11 <http://www.lawlink.nsw.gov.au/lawlink/irc/ll_irc.nsf/pages/IRC_research_information_annual_reports> at 3 September 2009.

77 Work Choices also introduced an exemption for employees 'engaged on a seasonal basis': s 638(1)(g), (8). However this appears to have had little practical impact on the jurisdiction. On this exemption, see also: Chapman, 'Unfair Dismissal Law and Work Choices', above n 22.

1 *Exclusions*

(a) Genuine Operational Reasons

A dismissal was not an unfair dismissal within the meaning of the Act where the employment was terminated 'for genuine operational reasons, or for reasons that include genuine operational reasons'.[78] The concept of 'operational reasons' was then defined to mean 'reasons of an economic, technological, structural or similar nature relating to the employer's undertaking, establishment, service or business' or relating to part of it.[79]

This formula of 'operational reasons' was considerably wider in scope than the legal concept of redundancy that had developed in Australia. In 2004 a Full Bench of the AIRC revisited the meaning of redundancy for the purpose of the standard award clause on redundancy pay, and stated that:

> Redundancy occurs when an employer decides that the employer no longer wishes the job the employee has been doing to be done by anyone and this is not due to the ordinary and customary turnover of labour.[80]

Although acknowledging that redundancy is not a legal term of art, the High Court has more recently applied an understanding of that concept as being the cessation of the job or position.[81]

As the Hon Paul Munro has written:

> The definition of operational reasons in the *WorkChoices Act* goes to another, much wider ground [than the legal concept of redundancy]. 'Operational reasons' imports notions of economic or structural expedience for the undertaking; neither those considerations, nor the genuineness of reasons relying upon them, are linked to cessation of the work being done by, or the job of, the particular employee.[82]

It is important to acknowledge that prior to the Work Choices amendments to the *WR Act*, employees who had been made redundant may have been able to successfully pursue a remedy under unfair dismissal law. Although the AIRC was generally not prepared to interfere with an employer's substantive decision regarding the needs of the enterprise for the redundancy, provided that decision was made in good faith, redundant employees were nonetheless able to assert that their dismissal was unfair on the ground that they were not afforded procedural fairness in the process of dismissal, or that, for example, it was not sound or defensible to select them ahead of other employees, or that as their conduct or performance played a role in the decision to dismiss them, they ought to have been afforded an opportunity to respond to allegations of misconduct or inadequate performance.[83] Work Choices took effect to bar employees made redundant, and in addition many more employees terminated for a broader 'genuine operational reason', from accessing a remedy for unfair dismissal.

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78 *WR Act* s 643(8).

79 *WR Act* s 643(9).

80 *Redundancy Case* (2004) 129 IR 155, 244.

81 *Amcor Limited v CFMEU* (2005) 222 CLR 241, 249–50 (Gleeson CJ and McHugh J), 274–5 (Kirby J).

82 Paul Munro, 'Changes to the Australian Industrial Relations System: Reforms or Shattered Icons? An Insider's Assessment of the Probable Impact on Employers, Employees and Unions' (2006) 29 *University of New South Wales Law Journal* 128, 146.

83 See Breen Creighton and Andrew Stewart, *Labour Law* (4th ed, 2005) [16.67]–[16.68].

This exemption of 'genuine operational reasons' received considerable adjudicative scrutiny regarding its meaning and scope and, in particular, the causal link required between the employer's operational reason and the particular termination in question. The following passages of this article provide a broad sense of the way that principles and approaches to interpretation developed.[84]

The early period of the genuine operational reasons exemption was marked by the narrow approach to interpretation taken in *Perry v Savills (Vic) Pty Ltd*.[85] For the termination to be *genuinely* related to the employer's operational reason, Watson SDP determined that the termination of the employee in question must have been a 'logical response' to the employer's genuine operational reason.[86] This approach provided scope in the adjudication to examine whether redeployment of the employee within the employer's undertaking was feasible and, more generally, whether the dismissal was appropriate, given the employee's experience and the employer's plans of expansion. This approach bore similarities to the type of inquiry that the AIRC used to conduct in the pre-Work Choices era, when determining whether the dismissal of an employee in a redundancy context was an unfair dismissal.

In the January 2007 decision of *Village Cinemas Australia Pty Ltd v Carter*,[87] the Full Bench rejected this 'logical response' approach, expressing the opinion that in enacting Work Choices, the Commonwealth Parliament specifically intended to put a stop to the type of approach taken in *Perry v Savills*.[88] In the opinion of the Full Bench, as the task of the AIRC was not to inquire into whether the dismissal was unfair, or inappropriate, questions of redeployment, the years of service of the employee and the like, were generally irrelevant.

In terms of the connection that was required between the operational reason and the particular termination in question, the Full Bench in *Village Cinemas* determined that:

> the operational reason relied upon by the employer need only be a ground or cause for the termination of the employment of the employee. It need not be something that demands or brings about an obligation to terminate the employment of a particular employee. The termination … does not have to be an unavoidable consequence of the operational reason.[89]

The Full Bench stated that the words of the exemption must be given their ordinary meaning, and indicated that 'genuine' means 'real, true or authentic, and not counterfeit'.[90] This interpretation was intended to ensure that the operational reason proffered by the employer was not a sham, for example, to cover a racially motivated reason for dismissal.

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84 See generally Anthony Forsyth, 'Australian Regulation of Economic Dismissals: Before, During and After "Work Choices"' (2008) 30 *Sydney Law Review* 506, which contains an excellent synthesis and critique of case developments.

85 *Perry v Savills (Vic) Pty Ltd* [2006] AIRC 363 ('*Perry v Savills*').

86 Ibid [41].

87 *Village Cinemas Australia Pty Ltd v Carter* (2007) 158 IR 137 ('*Village Cinemas*').

88 Ibid [36].

89 Ibid [28].

90 Ibid [26], [35].

Village Cinemas was the high water mark of the genuine operational reasons exemption. The breadth and practical ramifications of *Village Cinemas* were reflected in the suggestion that '[i]t may be … that it would be a rare occasion where an employer could not construct a situation where an operational reason would provide the reason, or one of the reasons for the termination'.[91]

Subsequent AIRC decisions continued the understanding of the scope and interpretation of the genuine operational reasons exemption established in *Village Cinemas*. Specifically, the exemption was interpreted to be considerably wider than the accepted industrial understanding of redundancy, meaning that there was no need to show that the position or job of the employee had ceased to be performed. There was, in addition, no need for an employer to show a pressing financial need for the restructure that led to the termination in question, as 'economic' reasons were only one type of operational reason recognised. It was moreover sufficient that the restructure was intended to enhance efficiency, for example, by improving staffing structures. Importantly, the case decisions indicated that a restructure for the purpose of improving profitability or competitiveness by cutting labour costs would come within the 'genuine operational reasons' exemption. Lastly the AIRC repeatedly confirmed that it had no mandate to consider questions of procedural fairness in its determination of whether the 'genuine operational reasons' exemption applied.[92]

(b) One Hundred Employees or Fewer

A termination was not covered by unfair dismissal law where the employer employed 100 employees or fewer at the date of termination.[93] This was the most significant of the new exemptions introduced with the Work Choices amendments, in that it was estimated that this exclusion removed unfair dismissal protection from approximately 4.6 million (or 56 per cent) of employees in Australia.[94]

The history of this exemption lies in the more than 10 unsuccessful attempts by the Coalition Government from 1997 to introduce an exemption for businesses with fewer than 15 (and, after 2001, fewer than 20) employees.[95] The Coalition Government always sought to justify this 100 employee exemption (and its previous unsuccessful attempts at smaller exemptions) as job creation

91 *Campagna v Priceline Pty Ltd* [2007] AIRC 147, [9].
92 See Forsyth, 'Australian Regulation of Economic Dismissals', above n 84, 526–32.
93 *WR Act* s 643(10).
94 Explanatory Memorandum, Fair Work Bill 2008 (Cth) [r.210].
95 The government was never able to get sufficient Parliamentary support for its plans: Steve O'Neill, *Background Note: Unfair Dismissal and the Small Business Exemption*, Parliament of Australia, Parliamentary Library (2008), <http://www.aph.gov.au/library/pubs/BN/2007-08/UnfairDismissal.htm> at 3 September 2009; Marilyn Pittard, 'Recent Legislation: Unfair Dismissal Laws: The Problem of Application to Small Businesses' (2002) 15 *Australian Journal of Labour Law* 154.

measures, but those claims have been widely discredited in economics and labour market literature.[96]

The 100 employees referred to in this exemption was a headcount at the date of the termination of employment. It included in the count the applicant, all full-time and part-time employees of the employer (to count as one each), and all employees of 'related bodies corporate' of the employer. The count excluded casuals with less than 12 months service.[97] Importantly the count was of employees in the common law sense only, and so excluded contractors and others who provide their services under contracts that are not contracts of employment.

The concept of 'related bodies corporate' was defined exclusively by reference to section 50 of the *Corporations Act 2001* (Cth). It notably did not include any of the wider relationships recognised under that Act, such as 'associated entities' or 'entit[ies] controlled by another entity'.[98] Although both the *Corporations Act 2001* (Cth) and the *WR Act* were silent on the issue, there were at least two decisions that suggested that a foreign corporation could be a 'related bod[y] corporate', and hence its employees ought to be included in the headcount. In the first of those cases, the issue of a foreign corporation was not explicitly discussed, although the employees of such a company were included in the count.[99] In the second case, that issue was contested at the hearing, with the Commissioner determining that employees engaged in the USA by a company incorporated outside Australia ought to be included. In that case the employer did not succeed in its argument that the 100 employee exemption applied.[100]

(c) Serving a Qualifying Period

In 2001 the Commonwealth Parliament enacted a default three month qualifying period into the *WR Act* scheme. Work Choices extended that period to six months, subject to an ability to shorten, or lengthen, that period by agreement prior to the commencement of the employment. If a longer period was agreed, that time period was required to be 'reasonable … having regard to the nature and the circumstances of the employment'.[101]

This qualifying period sat alongside the provisions regarding probation periods, first introduced into the statutory scheme in 1993.[102] In relation to probation, the duration was required to be determined in advance (though not necessarily in writing), and to be a maximum of three months, or a longer period

96 For an overview of empirical studies on unfair dismissal law and job creation, see Chapman, 'Unfair Dismissal Law and Work Choices', above n 22, 244–5. See also: OECD, *Economic Policy Reforms: Going for Growth* (2007) 96; Senate Standing Committee on Education, Employment and Workplace Relations, Parliament of Australia, *Report on Fair Work Bill 2008 [Provisions]* (2009) [2.34]–[2.37].

97 *WR Act* s 643(12).

98 See also Chapman, 'Unfair Dismissal Law and Work Choices', above n 22, 243–4.

99 *Baldacchino v Triangle Cables (Australia) Pty Ltd* [2006] AIRC 313. In this case the employer did succeed in its argument that the 100 employee exemption applied.

100 *Wilkinson v Hospitality Marketing Concepts Pty Ltd* [2006] AIRC 494.

101 *WR Act* s 643(6), (7).

102 *Industrial Relations Reform Act 1993* (Cth), inserting s 170CC.

where that period was 'reasonable, having regard to the nature and circumstances of the employment'.[103]

The conceptual distinction between the qualifying period and the probation period was always obscure, and mostly the AIRC was not troubled by this. In terms of adjudicating in relation to these two, the AIRC interpreted the legislation to require that they be construed as separate and independent requirements, to be applied discretely.[104]

A main issue that arose before the AIRC in relation to this exemption was whether certain changes in employment attracted a new qualifying period and probation period. The factual contexts in which this issue arose varied, and included situations where an employee had been appointed to a new position with his or her existing employer, where an employee had altered his or her status from casual employment to full-time employment (with little change in duties), and where there had been a transmission of business. In several cases of this type the qualifying period had been restarted following the change, with the result that long standing employees of a business were excluded from bringing an unfair dismissal application due to the operation of the qualifying period requirement.[105]

2 *Unfair Dismissal and the FW Act*

The unfair dismissal provisions in the *FW Act* apply in relation to 'national system employees' and 'national system employers'.[106] These terms, defined in sections 13 and 14, have been discussed above.

The main feature of the *FW Act* provisions on unfair dismissal is that they will increase the number of employees with access to making a claim. This has been achieved through rewriting some exemptions in a narrower form, and deleting other exemptions. The Explanatory Memorandum records that the changes will bring into coverage around 3 000 000 more employees (of 100 000 new businesses).[107] The Government predicts that the number of unfair dismissal applications is expected to revert to 2004–05 levels (around 6 500 applications annually).[108]

The main sets of exemptions and exclusions that place a dismissal outside the scope of the *FW Act* are examined in turn. They are: compliance by a 'small business employer' with the Small Business Fair Dismissal Code; 'genuine redundancy'; the 'minimum employment period'; and the non-award high income earner exclusion. Following this the *FW Act* provisions on procedure and remedies are examined.

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103 *WR Act* s 638(1)(c).

104 See, eg, *Hewson v Southern Aboriginal Corporation* [2008] AIRC 116; *Bartle v GBF Underground Mining Co* [2006] AIRC 654.

105 See, eg, *Stanfield v Childcare Services Pty Ltd* [2008] AIRC 127; *Aged Care Services Australia Group Pty Ltd v Ziday* (2008) 172 IR 385.

106 *FW Act* s 380.

107 Explanatory Memorandum, Fair Work Bill 2008 (Cth) [r.13].

108 Ibid [r.251].

3 *Exclusions*

(a) Small Business Employers and the Code

Provisions have been enacted with the *FW Act* to the effect that a dismissal by a 'small business employer' cannot be an unfair dismissal where it was consistent with the 'Small Business Fair Dismissal Code'.[109]

The meaning of a 'small business employer' is defined in section 23 of the Act to mean an employer who 'employs fewer than 15 employees' at the relevant time.[110] The Bill as introduced (and ultimately as enacted) established that this was a head count of all employees in the common law sense engaged under contracts of employment, including the applicant and other employees being dismissed at that time, and including casuals employed on a 'regular and systematic' basis. Employees of 'associated entities' were also to be included in the head count.

The definition of 'small business employer' was subject to much debate in the Senate and became a main sticking point for the Government in getting its legislation through the Upper House. There were attempts to increase the number to 20 employees, and calculate it according to a full-time equivalency rather than a head count. In the end the Government struck an agreement with Family First Senator Steve Fielding to the effect that until 1 January 2011, a 'small business employer' will be one with fewer than 15 full time equivalent employees. This arrangement was put into place through the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth), which received assent on 25 June 2009.[111] The number of full-time equivalent workers will be assessed by averaging the ordinary hours worked in the business by all employees over the four weeks prior to the dismissal, and then dividing that number by 38 (representing ordinary weekly hours).[112]

A 'Small Business Fair Dismissal Code' was declared under the *FW Act* on 24 June 2009.[113] It is a very short document, comprising seven paragraphs. In relation to allegedly serious misconduct justifying summary dismissal (that is, dismissal without notice), the Code provides that it is a fair dismissal where the employer 'believes on reasonable grounds' that the employee's behaviour would justify summary dismissal. Theft, fraud, violence, or serious breach of occupational health and safety procedures are identified in this respect. '[I]t is sufficient, though not essential,' states the Code, that an allegation of theft, fraud

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109 *FW Act* ss 385(c), 388.

110 See *FW Act* s 388 on when the relevant time is.

111 *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth), sch 12A.

112 Ibid.

113 The Code was declared under the *FW Act* s 388(1). It replicates the draft released by the Government as a fact sheet in September 2008, save for a grammatical alteration, and an important change in terms of providing evidence of compliance with the Code. This is discussed further below. For the draft, see Department of Education, Employment and Workplace Relations, *A Simple, Fair Dismissal System for Small Business*, Fact Sheet 9 (2008), <http://www.deewr.gov.au/WorkplaceRelations/NewWorkplaceRelations/Pages/FactSheets.aspx> at 3 September 2009.

or violence be reported to the police. It is implicitly irrelevant whether or not the allegation turns out to be well founded.

The Code may represent a significant lessening of the standard that has been required of employers in the past. Whether it does will depend on how the concept of 'reasonable grounds' is interpreted. For an employer to believe on 'reasonable grounds' that a summary dismissal is justified may require that a level of procedural fairness be accorded to an employee, such as being provided with an opportunity to respond to allegations of misconduct or lack of performance.

Merely suspecting an employee of theft etc, albeit reasonably, and even reporting it to the police, would not necessarily have been a fair dismissal in the past, because whether or not the employee was treated in a procedurally fair manner (ie, given an opportunity to respond to allegations) may potentially be very important in an overall assessment of whether the particular dismissal was 'harsh, unjust or unreasonable'. The relevance, in an assessment of 'harsh, unjust or unreasonable', of the fairness of steps taken prior to a termination has been recognised by members of the High Court.[114]

In relation to serious misconduct, the Code applies a lower standard than even the common law requires of employers in those situations. Although inroads are being made in this respect, the common law still does not generally require that the employee be given procedural fairness in dismissal. It does however require that the employer establish that the serious misconduct actually occurred, should the dispute proceed to a hearing.[115] In contrast, the Code not only does not require procedural fairness, it does not even require that the allegedly serious misconduct be shown to have in fact taken place. It merely requires that the employer believed on 'reasonable grounds' that the misconduct occurred.

In relation to other – less serious – misconduct or performance issues, the Code provides that the employer 'must' give the employee a valid reason as to why he or she is at risk of being dismissed. The valid reason must be based on the employee's conduct or capacity. In those situations the employee must receive a warning (which need not be in writing). Several Senate submissions, including those from FairWear Victoria and the Textile, Clothing and Footwear Union of Australia expressed the view that this warning should at least be in writing.[116] The majority Senate Committee report agreed with these submissions and recommended that the warning ought to be provided in writing, and take into account the needs of workers from non-English speaking backgrounds.[117] That recommendation was not taken up by the government. The Code also provides that the employee must be given a reasonable chance to rectify the problem before being dismissed. The Code notes that this might involve the employer providing additional training to the employee.

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114 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 464–8 (McHugh and Gummow JJ).

115 Owens and Riley, above n 25, 265–6.

116 Senate Standing Committee on Education, Employment and Workplace Relations, above n 96, [5.30].

117 Ibid [5.32].

In addition, the Code provides that the employee is entitled to have a person present to assist them in discussions 'in circumstances where dismissal is possible'. This appears to relate both to summary dismissal and dismissal for less serious misconduct. However, that support person cannot be a lawyer acting in a professional capacity.

These provisions in the Code regarding less serious misconduct or performance issues place considerable emphasis on procedural fairness, and lesser emphasis on substantive fairness. Although the employer should provide a valid reason in the warning, the Code does not actually require that there be a valid reason for the ultimate dismissal.

FWA will have the task of assessing whether the 'small business employer' has complied with the Code, as part of determining whether it has jurisdiction in relation to an application of unfair dismissal.[118] The Code states that a 'small business employer will be required to provide evidence of compliance with the Code', including certain specified matters such as that a warning has been given (except in cases of summary dismissal). This is an alteration from the draft Code released by the Government in September 2008 which stated that an employer 'may' be required to provide evidence of compliance with the Code.

The idea of a Code is innovative, and no doubt could play a useful role in translating abstract legal principles into a language more readily understood and made alive in day-to-day management practices. In its final incarnation, however, the Code is disappointing in setting a relatively low standard for small business employment practices.

(b) Genuine Redundancy

The *FW Act* provides that a 'genuine redundancy' will not be an unfair dismissal.[119] A 'genuine redundancy' is defined to mean where the employer 'no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise', and 'the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.'[120] The Act provides that it is not a 'genuine redundancy' if it would have been reasonable in all the circumstances for the person to be redeployed in the employer's enterprise or that of an 'associated entity'.[121]

This provision rewrites in a much narrower form the 'genuine operational reasons' exemption of Work Choices. It does not go so far though as to restore

118 *FW Act* s 385(c).

119 *FW Act* ss 385(d), 389. The earlier policy documents indicated a redundancy exemption applicable to small business: Kevin Rudd and Julia Gillard, *Forward with Fairness: Policy Implementation Plan* (2007) 19 <http://www.alp.org.au/download/070828_dp_forward_with_fairness___policy_implementation_plan.pdf> at 3 September 2009. The Australian Industry Group pushed for a redundancy exemption for all businesses, regardless of size: Heather Ridout, 'Australian Industry Group: Speech to the Industrial Relations Society of Queensland's Patrons Lunch' (16 May 2008) 19.

120 *FW Act* s 389(1).

121 *FW Act* s 389(2).

the pre-Work Choices position on redundancy, which allowed redundant employees to challenge their dismissal on various bases, and notably a lack of procedural fairness. The wording of the *FW Act* concept of 'genuine redundancy' – especially the reference to the employer no longer needing the job to be performed by anyone – references established legal understandings of redundancy as being where a job has disappeared. The test cases through which that concept of redundancy has been articulated are discussed above.[122]

Notably, the concept of 'operational requirements' is considerably narrower than Work Choices' 'genuine operational reasons' formulation. An 'operational requirement' has a more mandatory flavour to it than a mere 'operational reason'. In the context of interpreting the federal unfair dismissal scheme that was enacted with the *Industrial Relations Reform Act 1993* (Cth), which required that the employer have a valid reason for termination, based on capacity or conduct, or the 'operational requirements' of its undertaking, Lee J stated:

> In general terms it may be said that a termination of employment will be shown to be based on the operational requirements of an undertaking if the action of the employer is necessary to advance the undertaking and is consistent with management of the undertaking that meets the employer's obligations to employees.[123]

In that case, the applicant was a 16 year old casual kitchen hand who had been employed in the employer's hotel. The evidence established that the employer had recently engaged a new head chef and had authorised her to hire a new person to take over the applicant's duties.[124] The person the chef hired had worked in her kitchen in the past. Justice Lee determined that the applicant was dismissed due to the arrangement made with the new head chef that she could hire her own kitchen hand. On that basis, there was no valid reason for the applicant's dismissal related to the 'operational requirements' of the undertaking. Although the new kitchen hand could carry out the additional duty of serving alcohol in the hotel, which the applicant could not, that was not an 'operational requirement' of the business, as other casual staff were available to serve alcohol.[125]

By contrast, had the dismissal of the applicant in this case occurred in more recent times, it is likely to have been covered by the Work Choices' 'genuine operational reasons' exemption.[126] Although Lee J stated that it was not a 'requirement of the business that it employ the new employee to maintain, or improve, its position in the market',[127] it is likely that the employer could have

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122 See above ns 80–1.

123 *Nettlefold v Kym Smoker Pty Ltd* (1996) 69 IR 370, 373.

124 Justice Lee noted that this arrangement with the new head chef had no contractual basis to it: ibid 374.

125 The applicant was awarded $1 000 by way of compensation. That sum included $250 by way of payment in lieu of the notice that the applicant ought to have been provided with: ibid 375.

126 Of course had the applicant brought her application under the *WR Act* after the Work Choices amendments, it is likely that she would have been barred by other exemptions as well, such as the 100 employee exemption, and the short term casual employee exclusion, as she had not been engaged by the employer for at least 12 months.

127 *Nettlefold v Kym Smoker Pty Ltd* (1996) 69 IR 370, 374.

successfully argued that the 'genuine operational reason' in this case was a 'structural' one – being to replicate a good team in the kitchen and gain flexibility from having a kitchen hand who could also work behind the bar.

(c) Minimum Employment Period

An employee cannot pursue an unfair dismissal application until he or she has served the 'minimum employment period'. That period is six months, or 12 months in the case of a 'small business employer' (as defined in section 23, and discussed above).[128] These new provisions replace the qualifying period and probation period requirements of Work Choices. The 'minimum employment period' requires 'continuous service', which is defined in section 22 to deal with situations such as periods of unauthorised absences, unpaid leave, and transfer of business.[129] In these provisions casual employees are treated the same as all other employees, provided their employment was 'regular and systematic', and had 'a reasonable expectation of continuing employment'.[130] This means that such casuals engaged by a larger employer can now qualify to lodge an application of unfair dismissal after completing six months of service (whereas with Work Choices it was 12 months).[131] Nonetheless, the majority Senate Committee Report records the opinion of the ACTU that this 'minimum employment period' rule would exclude 41 per cent of all hospitality workers, and 64 per cent of young people aged 20–24.[132]

The *FW Act* contains new provisions about transfer of business situations. It provides that where the old employer and the new employer are not 'associated entities', then the new employer can expressly inform employees in writing before their new employment starts that a period of service with their old employer will not be recognised.[133] This addresses the issue that has arisen regarding transfer of business and the Work Choices' qualifying period requirement (noted above). The new rule certainly appears to bring clarity to the situation, albeit that it now appears to be very easy for a new employer to start the clock again with an employee.

(d) Non-Award High Income Earners

This exemption relates to a 'national system employee' who is not covered by a modern award, or an enterprise agreement does not apply to them, and they

128 *FW Act* ss 382(a), 383.
129 *FW Act* s 384(1).
130 *FW Act* s 384(2)(a).
131 See *WR Act* s 638(1)(d), (4).
132 Senate Standing Committee on Education, Employment and Workplace Relations, above n 96, [5.10].
133 *FW Act* s 384(2)(b).

earn more than the 'high income threshold'. [134] That threshold is currently $108 300 per annum (indexed) for full time employees.[135]

(e) Summary

By way of summary then, the following exclusions that were in the *WR Act* after the Work Choices amendments no longer exist in the *FW Act* framework:

- the 100 employee exclusion (although there is now a Code for 'small business employers');
- the exclusions in relation to employees engaged under contracts of employment for a specified period of time, specified task, duration of a season or training arrangement;[136]
- the exclusion of casuals with less than 12 months service.

The Work Choices 'genuine operational reasons' exemption has been transformed into a much narrower 'genuine redundancy' exemption, and the Work Choices qualifying and probation period exemptions have been replaced with the 'minimum employment period' requirement.

4 *Procedure and Remedies*

As introduced, the Fair Work Bill 2008 (Cth) provided that employees had seven days in which to lodge an application of unfair dismissal, with the Government stating that the purpose of this was to ensure that reinstatement remained a viable option.[137] Under the *WR Act* (both before and after the Work Choices amendments) the time frame was 21 days, with an ability to extend.[138] Seven days was widely criticised in submissions made to the Senate Inquiry by employer associations, trade unions, academics and community legal centres, who all considered it to be far too short. Concerns were expressed that it would disadvantage employees in remote areas, people from non-English speaking backgrounds, people who might be distressed following their dismissal, and people who may not be aware of their legal rights.[139] Community legal centres gave evidence that they would be unlikely to be able to advise clients properly

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134 *FW Act* s 382(b). Whether a modern award covers the person, or an enterprise agreement applies to them may not be straightforward: Stewart, 'A Question of Balance', above n 29, 15.

135 See *FW Act* ss 12, 333 for the definition of 'high income threshold'. The *Fair Work Regulations 2009* (Cth) provide a method for determining whether a person's income exceeds the threshold: reg 3.05. See also Explanatory Memorandum, Fair Work Bill 2008 (Cth) [1514].

136 Note that not being rehired at the end of such a contract will not count as being 'dismissed' within the meaning of the Act: *FW Act* s 386(2). But being dismissed during the currency of the term, task, season or training arrangement can be challenged by the employee under the *FW Act* (whereas under the *WR Act* post-Work Choices it could not).

137 Kevin Rudd and Julia Gillard, *Forward with Fairness: Labor's Plan for Fairer and More Productive Australian Workplaces* (2007) 19, <http://www.alp.org.au/download/now/forwardwithfairness.pdf>.

138 *WR Act* s 170CE(7) (pre-Work Choices), s 643(14) (post-Work Choices).

139 Senate Standing Committee on Education, Employment and Workplace Relations, above n 96, [5.16]–[5.22].

within a seven day time frame.[140] Notably, and as pointed out in some submissions, a 60 day time frame exists under the *FW Act* in relation to applications alleging discriminatory dismissal by way of an 'adverse action' claim.[141]

The Senate Majority Committee recommended that the Bill be amended to provide a time limit of 14 days, with an ability to extend. The Committee also recommended that information about termination of employment be included in the Fair Work Information Statement that employers are required to provide to all new employees.[142] Both these recommendations were adopted and the Bill was amended. The *FW Act* provides that claims of unfair dismissal are to be lodged with FWA within 14 days after the dismissal took effect, with FWA having an ability to extend that time period in 'exceptional circumstances'.[143]

It seems that it may be more difficult for an applicant to get an extension of time under the *FW Act* than it was under the *WR Act* provisions. The leading case on the *WR Act* provisions (pre- and post-Work Choices) is *Brodie-Hanns v MTV Publishing Ltd*.[144] That case laid down six principles to govern the adjudicator's discretion to extend the time:

1. Special circumstances are not necessary but the Court must be positively satisfied that the prescribed period should be extended. The prima facie position is that the time limit should be complied with unless there is an acceptable explanation of the delay, which makes it equitable to so extend.
2. Action taken by the applicant to contest the termination, other than applying under the Act will be relevant. It will show that the decision to terminate is actively contested. It may favour the granting of an extension of time.
3. Prejudice to the respondent including prejudice caused by delay will go against the granting of an extension of time.
4. The mere absence of prejudice to the respondent is an insufficient basis to grant an extension of time.
5. The merits of the substantive application may be taken into account in determining whether to grant an extension of time.
6. Consideration of fairness as between the applicant and other persons in a like position are relevant to the exercise of the Court's discretion.[145]

These six principles are similar to the list of indicative factors that FWA is directed to take into account in determining whether to extend the time period

140 Ibid [5.22].

141 *FW Act* s 366.

142 Senate Standing Committee on Education, Employment and Workplace Relations, above n 96, [2.62], [5.24]–[5.25]. This latter recommendation regarding the Fair Work Information Statement was adopted: *FW Act* s 124(2)(f).

143 *FW Act* s 394.

144 (1995) 67 IR 298 ('*Brodie-Hanns*').

145 Ibid 299.

under the new Act.[146] Notably though, *Brodie-Hanns* was explicit that 'special circumstances' were not required in order to get an extension; whereas the *FW Act* provisions do require that 'exceptional circumstances' exist before the time period can be extended.

FWA has a general discretion to decide whether to resolve a claim of unfair dismissal by private 'conference' or a 'hearing', or a combination of the two.[147] The Act contains a preference for conferences, in the direction that FWA must not hold a hearing unless FWA considers it appropriate to do so, taking into account the views of the parties and whether a hearing would be 'the most effective and efficient way to resolve the dispute'.[148]

FWA clearly has much discretion as to how it will conduct unfair dismissal matters. Accordingly, FWA might choose to handle applications in a manner that is very different to how the jurisdiction has operated to date, or alternatively may proceed in a manner 'virtually indistinguishable' from the existing system under the *WR Act*.[149] The Explanatory Memorandum to the Bill (as introduced) records the Government's intention:

> The new system administered by FWA will be simpler and easier for all parties to use. … In the new system, FWA will be able to respond to claims in a flexible and informal manner. This includes through initial inquisitorial inquiries, and where there are contested facts, an informal conference or hearing. FWA will be able to make binding decisions following a conference, without the need for a formal, public hearing. Where conferences are held, they will be able to be conducted at alternative venues, such as the employer's place of business, which will minimise the cost in time and lost earnings an employer may face in defending a claim.[150]

Despite early statements from the Government that lawyers 'will be left out of the picture',[151] the rule enacted requires that FWA give its 'permission' for legal or other representation, such permission to be granted only if it would enable the matter to be dealt with more efficiently, or if it would be unfair not to allow the person to be represented.[152] The new legislation mentions some circumstances where permission may be appropriately granted: where the person is from a non-English speaking background or has difficulty reading or writing, or where a small business is a party to the matter and does not have a human resource specialist. It remains to be seen how these provisions will be interpreted

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146 *FW Act* s 394(3). Notably though s 394(3)(b) is not found in *Brodie-Hanns*. This is acknowledged in the Explanatory Memorandum to the Fair Work Bill: Explanatory Memorandum, Fair Work Bill 2008 (Cth) [1573]–[1574].

147 *FW Act* ss 397–399.

148 *FW Act* s 399(1).

149 Andrew Stewart quoted in '"Streamlined and Simplified" Unfair Dismissal Process Doesn't Lock Out Lawyers', *Workplace Express* (Sydney), 26 November 2008 <http://www.workplaceexpress.com.au> at 3 September 2009.

150 Explanatory Memorandum, Fair Work Bill 2008 (Cth) [r.226].

151 Rudd and Gillard, above n 137, 18.

152 *FW Act* s 596.

by FWA.[153] Under the *WR Act* rules on representation, which required that the AIRC grant leave for representation, legal representation was 'rarely denied'.[154]

The *FW Act* provides the same framework of remedies as under the *WR Act*, namely reinstatement or where that is 'inappropriate', an order for compensation to a capped amount.[155] The Work Choices amendments to the *WR Act* brought in two new rules that, if applied, reduced the amount of compensation ordered in lieu of reinstatement following a finding of unfair dismissal. These have been continued with the *FW Act* regime. The first is that the AIRC must take into account any misconduct of the employee that contributed to the decision of the employer to dismiss them, and to reduce the amount of compensation ordered accordingly.[156] Secondly, compensation orders must not include a component for 'shock, distress or humiliation, or other analogous hurt, caused to the employee by the manner of terminating the employee's employment'.[157] This second rule brings unfair dismissal into line with common law limits on damages.[158]

A decision of FWA can be appealed to a Full Bench of FWA but only where it is in the public interest to do so, and in relation to an appeal on a question of fact, the appeal can only be made on the ground that the decision involved a 'significant error of fact' at first instance.[159]

III CONCLUSION

This paper has profiled the decline of the federal unfair dismissal jurisdiction under the Work Choices amendments to the *WR Act*, and its rejuvenation under the recently enacted *FW Act*. The ALP Government provided two main rationales for the *FW Act* changes. The first was the need to restore 'balance' between two competing interests: fairness to employees and employer freedom to manage.[160] The second rationale was to enact a scheme that better recognises the needs of small business.[161] In the processes leading up to the enactment of the *FW Act* the Government largely side-stepped the difficult policy issues in this area of regulation. What does 'balance' in this context mean, and is it useful to assume a natural juxtaposition of employee and employer interests in this regard? A body of Australian research indicates that coverage by unfair dismissal law has a beneficial impact on businesses by generating better hiring, discipline, training,

153 See generally, Mark Mourell and Craig Cameron, 'Neither Simple Nor Fair – Restricting Legal Representation Before Fair Work Australia' (2009) 22 *Australian Journal of Labour Law* 51, 57–8.
154 Hor and Keats, above n 72, 185. See *WR Act* s 100.
155 *FW Act* s 390.
156 *FW Act* s 392(3).
157 *FW Act* s 392(4).
158 *Intico (Vic) Pty Ltd v Walmsley* [2004] VSCA 90. See generally, Chapman, 'Unfair Dismissal Law and Work Choices' above n 22, 254.
159 *FW Act* s 400.
160 See, eg, *FW Act* s 381(1); Rudd and Gillard, above n 119, 19.
161 See, eg, Explanatory Memorandum, Fair Work Bill 2008 (Cth) [1507]; Rudd and Gillard, above n 135, 18.

monitoring and dismissal procedures, leading potentially to productivity gains.[162] Other questions could usefully also be addressed. What exactly are the special needs of small business? What justifies the doubly long 'minimum employment period' for small business? If anything, the evidence on how small business operates suggests that a small business proprietor needs less time in which to assess the suitability of a new employee than a larger business, as 'day-to-day operations and principal decision-making [are] undertaken by the business owner' personally.[163] The Prime Minister has said that the special rules for small businesses are about helping them to grow into medium and large businesses.[164] But where is the evidence for this claim? The Prime Minister's rationale seems similar to the widely discredited claim of job creation for the 100 employee exemption made by the Coalition when in government.

Until these (and other) genuinely difficult policy questions are addressed, the jurisdiction will continue to be beset by the lack of a coherent framework, generating its own controversy and resistance. Addressing these policy matters requires us to go back to first principles to more clearly articulate what a fair dismissal is comprised of. This needs to be our starting point, because everything else flows from this, namely which workers to cover, what fairness means (in terms of procedural and/or substantive fairness), and whether any exclusions are justified.

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162 For a synthesis of this research, see generally Chapman, 'Unfair Dismissal Law and Work Choices', above n 22, 245; Chapman, 'The Decline and Restoration of Unfair Dismissal Rights', above n 26, 225–6.

163 Karen Wheelwright, 'Protecting and Promoting Small and Medium Enterprises: A Role for Labour Law in the New Labour Law Era?' in Chris Arup et al (eds), *Labour Law and Labour Market Regulation* (2006) 86, 95. Some submissions to the Senate Inquiry articulated this, see Senate Standing Committee on Education, Employment and Workplace Relations, above n 96, [5.9].

164 Kevin Rudd, Radio Interview, 2UE Sydney, 15 October 2007.